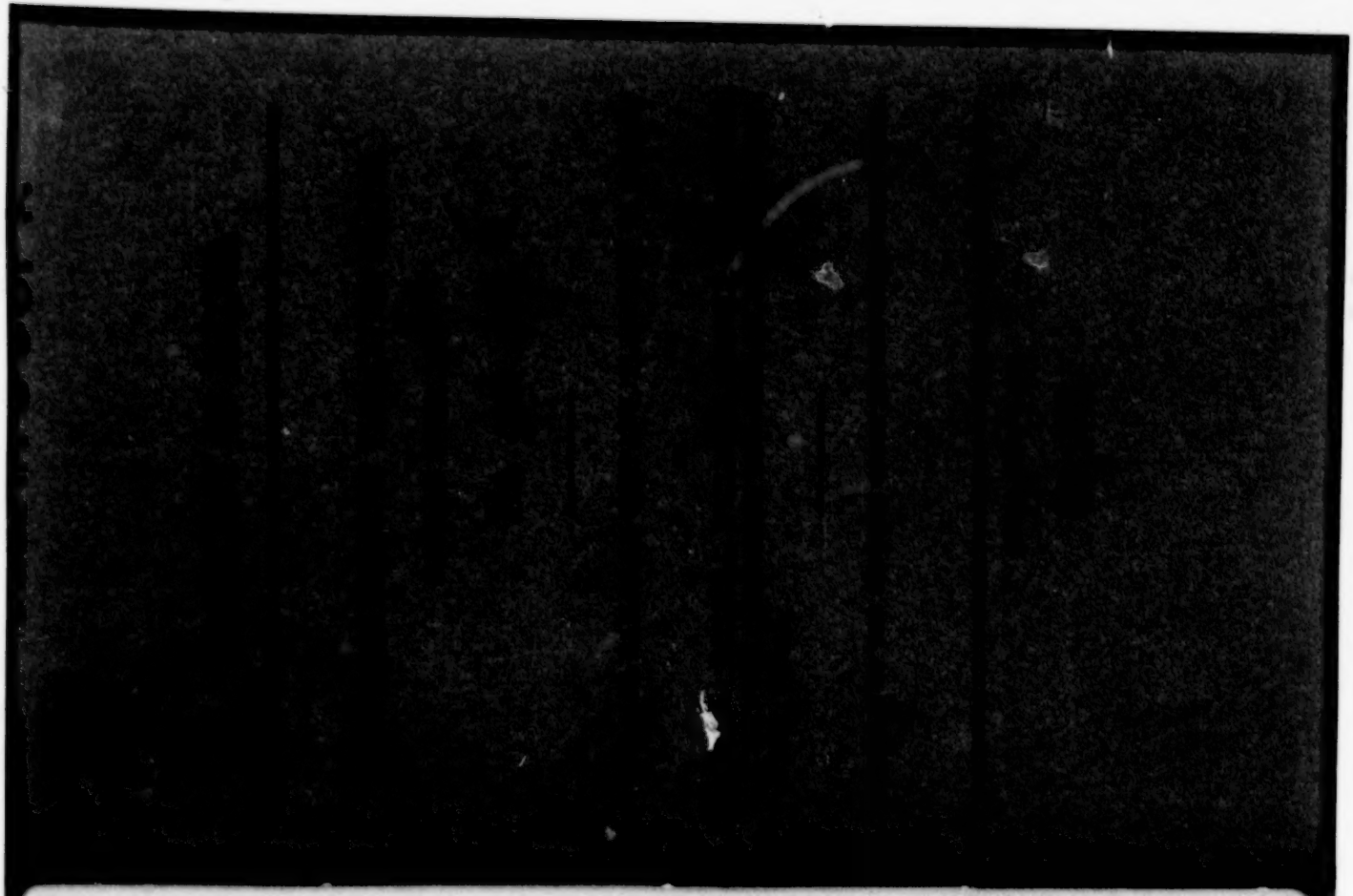

(27,163)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 408.

VANDALIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN, AND GEORGE C. GRIFFIN, COMPOSING THE FIRM OF SCHNULL & COMPANY, *ET AL.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript of record from the superior court of Marion County.	2	1
Caption	2	1
Complaint	6	2
Order transferring case to superior court	21	9
Defendant's demurrer to the complaint	22	9
Demurrer to complaint overruled and exception	23	10
Answer, first and second paragraphs	25	11
Answer, third paragraph	27	12
Demurrer to second paragraph of answer	32	15
Demurrer to third paragraph of answer	34	16
Demurrer to second paragraph of answer	36	17
Demurrers to second and third paragraphs of answer sustained and exception	38	18
Defendant's election to stand upon its second and third paragraphs of answer	39	19
Cause submitted	39	19
Finding for plaintiffs	40	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 20, 1920.

	Original.	Print.
Judgment and decree	40	19
Defendant's petition to sustain operation of decree and injunction	42	20
Affidavit of George G. Griffin	52	25
Order suspending decree and injunction for 30 days	55	27
Exceptions of parties to order suspending decree and injunction	58	28
Defendant's motion to modify order of suspension of decree of injunction	59	29
Motion to modify order of suspension overruled and exception	60	29
Defendant's motion for new trial	60	29
Motion for new trial overruled and exception	64	32
Appeal granted	65	32
Appeal bond and surety approved	65	32
Twenty days allowed for filing bill of exceptions	65	32
Suspension bond filed	66	33
Suspension bond	66	33
Appeal bond filed	72	36
Appeal bond	73	36
Bill of exceptions filed	76	38
Defendant's bill of exceptions	77	39
Index	78	39
Offers of evidence, &c	82	41
Exhibit 1—Stipulation as to evidence	82	41
Exhibit 2—Extracts from record in case of Wood *et al. vs.* Vandalia Railroad Company	88	43
Citation	89	44
Complaint	90	44
Answer	102	50
Order denying temporary injunction	112	55
Replication	113	55
Order vacating order of reference	114	56
Master's report of evidence	115	56
Exhibit 3—Petition filed by Schnull & Co. before the Railroad Commission	125	61
4—Amended petition before Railroad Commission	128	62
5—Stipulation as to facts	138	67
6—Page 9 of record in case of Woods *vs.* Vandalia R. R. Co	139	68
7—Summons and sheriff's return of service, &c	141	69
8—Letter, Downing to Riley, December 15, 1906	146	71
9—Mandate of Supreme court U. S. in case No. 11, October term, 1913	148	71
Item bill	155	74
10—Judgment of district court on mandate	156	75
11—Original judgment	159	76

	Original.	Print.
Exhibit 12 —Application for appeal, &c	163	78
Declination of Union B. Hunt *et al.* to join application	170	81
Allowance of appeal	179	84
12*a*—Testimony of John H. Buchanan	180	85
Testimony of Hewitt H. Lingle	184	87
Exhibit No. 13—Tabulation of shipments made over Vandalia R. R. Co. from Indianapolis to Terre Haute, June to December, 1915	189	89
Testimony of William J. Griffin	190	90
Testimony of George G. Griffin	196	92
Stipulation as to facts, &c	200	94
Exhibit 14—Petition of Vandalia R. R. Co. before Public Service Commission	203	95
15—Order of Public Service Commission, November 18, 1913	207	97
16—Letter, McClure to Williams, November 18, 1913	209	97
Objections to Exhibit No. 16	210	98
Reporter's certificate	211	98
Judge's certificate to bill of exceptions	212	99
Præcipe for record	213	100
Clerk's certificate	214	100
Assignment of errors	215	101
Minute entries	217	102
Case advanced	217	103
Submission	217	103
Motion for oral argument and briefs filed, &c	217	103
Opinion, Harvey, C. J.	221	104
Judgment	234	112
Petition for writ of error	235	112
Assignment of errors	236	113
Bond on writ of error	239	115
Writ of error	242	117
Citation and service	244	119
Præcipe for record	247	119
Clerk's certificate	249	121

1 STATE OF INDIANA:

In the Supreme Court.

No. 23204.

Be It Remembered, that heretofore, to-wit: on the 15th day of January, 1917, the same being the — judicial day of the November Term, 1916, of the Supreme Court of Indiana, the Vandalia Railroad Company, by its attorneys, filed in the office of the Clerk of said Court, a transcript of the record and proceedings had in the Superior Court of Marion County, Indiana, in a cause wherein Vandalia Railroad Company was Appellant and Gustav A. Schnull et al., were appellees, together with an assignment of errors thereon by said appellant, which transcript and the assignment of errors thereon are in the words and figures following, to-wit:

2–5 Be It Remembered, that among the records of the Superior Court of Marion County, Indiana, are the following in the cause of:

No. 109,535.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN, GEORGE C. GRIFFIN, Composing the Firm of Schnull & Co.; Lawrence A. Busby, Charles F. Zies, William Ralph Elliott, Arthur W. Jones, Simon F. Gonter and Joseph F. Gonter, Composing the Firm of S. F. Gonter & Co.; Carl C. Nichols, Daniel W. Davis, Doing Business under the Name and Style of Davis and Company; Samuel F. Adamson and Claude E. Adamson, Composing the Firm of S. F. Adamson & Son, Absalom Shaffer and William Collier, Composing the Firm of Shaffer & Collier,

vs.

VANDALIA RAILROAD COMPANY.

Be It Further Remembered, that heretofore towit: On the 26th day of August, 1915, the plaintiffs in the above entitled cause by counsel filed in the office of the Clerk of the Marion Circuit Court, their complaint, in the words and figures following:

6 STATE OF INDIANA,
Marion County, ss:

Circuit Court.

No. 25,585.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN, GEORGE G. GRIFFIN, Composing the Firm of Schnull & Co.; Lawrence A. Busby, Charles F. Zies, William Ralph Elliott, Arthur W. Jones, Simon F. Gonter, and Joseph S. Gonter, Composing the Firm of S. F. Gonter & Co.; Carl C. Nicholas, Daniel W. Davis, Doing Business under the Name and Style of Davis & Company; Samuel F. Adamson and Claude E. Adamson, Composing the Firm of S. F. Adamson & Son; Absolom Shaffer and William Collier, Composing the Firm of Shaffer & Collier,

vs.

THE VANDALIA RAILROAD COMPANY.

Complaint for Mandatory Injunction.

Gustav A. Schnull, William J. Griffin, and George G. Griffin, who compose the firm of Schnull & Co., which firm is engaged in business as wholesale grocers in the City of Indianapolis, in the State of Indiana, Charles F. Zeis, who is engaged in business as a retail grocer in the City of Greencastle, William Ralph Elliott, who is engaged in business as a retail grocer in the town of Plainfield, in the
7 State of Indiana, Arthur W. Jones, who is engaged in business as a retail grocer in the City of Brazil, in the State of Indiana, Simon F. Gonter and Joseph S. Gonter, who compose the firm of S. F. Gonter and Co., which firm is engaged in business as retail grocers in said City of Brazil, Absolom Shaffer and William Collier, who compose the firm of Shaffer and Collier, which firm is engaged in business as retail grocers in said City of Brazil, Carl C. Nicholas, who is engaged in business as a retail grocer at said City of Brazil, Samuel F. Adamson and Claude E. Adamson, who compose the firm of S. F. Adamson & Son, which firm is engaged in business as retail grocers in the town of Knightsville, in the State of Indiana, Daniel W. Davis, doing business under the name and style of Davis & Co., which firm is engaged in business as retail grocers in said town of Knightsville, for and on behalf of themselves, and all others having common interests with them, complain of the Vandalia Railroad Company, and for cause of action say that the said defendant is now and for more than ten years last past has been a consolidated corporation under the laws of the States of Indiana and Illinois, and a citizen of Indiana, with its principal place of business and office in the City of Terre Haute in the State of Indiana, and is now and for more than ten years last passed has been the owner, in possession of and operating, among others, a line of railroad extending from the city of Indianapolis in the County of

Marion in the State of Indiana, through the counties of
8 Marion, Hendricks, Putnam, Clay and Vigo in the State of Indiana, and through the cities of Greencastle, Brazil and Terre Haute in the State of Indiana, and through divers other towns and villages, which were stations upon the said line of railroad, to the line dividing the State of Illinois from the State of Indiana.

That for a long time prior to the month of August, 1865, said Vandalia Railroad had been and was in said month of August, 1865, engaged as a common carrier in the transportation of freight over the line of its railroad hereinbefore mentioned and described, and for the purpose of establishing its rates of charges for transporting and handling such freights carried over said line of railroad, had divided such charges for such service into six classes numbered respectively first, second, third, fourth, fifth and sixth, and had fixed and was then charging for the handling and transportation of such freight, per one hundred pounds stated in cents between the respective stations on its said line of railroad the following charges, viz:

From Indianapolis to station.	No. of miles.	Classes of freight.					
		1	2	3	4	5	6
Ben Davis	6.1	10	9	8	7	5	4
Bridgeport	9	12	11	10	8	6	5
Oak Plain	11	15	13	11	9	6½	5½
Plainfield	14	15	13	11	9	6½	5½
Gibson	15	15	13	11	9	6½	5½
9							
Cartersburg	17	18	15	12	10	7	6
Clayton	20	18	15	12	10	7	6
Pecksburg	23	20	18	14½	11	8	7
Amo	25	20	18	14½	11	8	7
Coatesville	28	20	18	14½	11	8	7
Fillmore	33	22	20	17	12	9	8
Almeda	36	22	20	17	12	9	8
Greencastle	39	22	20	17	12	9	8
Limedale	40	22	20	17	12	9	8
Hamrick	44	24½	22	19½	12½	9	8
Reelsville	47	24½	22	19½	12½	9	8
Eagles	50	24½	22	19½	12½	9	8
Harmony	54	24½	22	19½	12½	9	8
Knightsville	55	24½	22	19½	12½	9	8
Brazil	57	24½	22	19½	12½	9	8
Turner	59	25	22	19½	12½	9½	8
Stauton	61	25	22	19½	12½	9½	8
Cloverland	63	25	22	19½	12½	9½	8
Seeleyville	65	25	22	19½	12½	9½	8
Prairie	71	25	22	19½	12½	9½	8
Terre Haute	73	25	22	19½	12½	9½	8
Nelson	79	25	22	19½	12½	9½	8

That thereafter on the — day of August, 1905, the plaintiffs Gustav A. Schnull, William J. Griffin and Geo. G. Griffin, doing business under the name and style of Schnull & Co. were engaged in
10 business as wholesale grocers in the city of Indianapolis, and as thus engaged in said business making constant shipments of freight over the line of the Vandalia Railroad Company's road as hereinbefore mentioned and described, to various stations and points of delivery thereon and directly interested in the rates and charges to be paid for the handling and transportation of such freights, instituted proceedings before the Railroad Commission of Indiana to procure a reduction of the rates theretofore established by the defendant, and then in force and being charged and collected, as above set forth, asserting that said rates were extortionate and in excess of what would be a reasonable compensation to the defendant herein for services rendered by it in the handling and carrying of the classified freight to which such rates were applicable.

That thereupon the Railroad Commission of Indiana caused due notice to be issued and served upon the defendant herein of the filing of said application by said Gustav A. Schnull, William J. Griffin, George G. Griffin, doing business as Schnull & Co. and of the time when such application would be heard. That thereafter said defendant by its attorneys and solicitors appeared before said Railroad Commission of Indiana, in response to such notice, and was granted a full hearing upon the matters averred and charged in said application of Schnull & Co.; that much evidence was taken
11 and heard before said Railroad Commission of Indiana; and full argument was heard before said Commission both as to the law and upon the evidence, as to the merits of said application. And said Railroad Commission fully considered such evidence and argument; and having so done on the 14th day of December, 1906, entered its finding that rates complained of in said petition of Schnull & Co. and then in force, as hereinabove set forth, were unreasonable and unjust, in that they were excessive and that they were charged and collected in violation of law, and thereupon it was ordered by said Commission that "The Vandalia Railroad Company after February 1st, 1907, shall not charge or collect for the transportation of traffic moving over its lines from Indianapolis to the the Indiana-Illinois State line, as now classified by it under the Official Classification rates in excess of the following rates:

Rates in Cents per 100 Pounds.

From Indianapolis to station named.	Miles.	First.	Second.	Third.	Fourth.	Fifth.	Sixth.
Ben Davis	6	8	7	6.5	5	3.5	2.5
Bridgeport	9	8.5	7.5	7	5	4	3
Oakplain	11	8.5	7.5	7	5	4	3
Plainfield	14	9	8	7	5.5	4	3
Gibson	15	9	8	7	5.5	4	3
Cartersburg	17	9.5	8.5	7.5	5.5	4.5	3
Clayton	20	9.5	8.5	7.5	5.5	4.5	3
12 Pecksburg	23	10.5	9.5	8.5	6.5	4.5	3.5
Amo	25	10.5	9.5	8.5	6.5	4.5	3.5
Coatsville	28	11	10	9	6.5	5	3.5
Fillmore	33	11.5	10.5	9	7	5	4
Alemeda	36	12	11	9.5	7	5.5	4
Greencastle	39	12	11	9.5	7	5.5	4
Limedale	40	12	11	9.5	7	5.5	4
Hamrick	44	13	12	10.5	8	6	4.5
Reelsville	47	13.5	12	11	8	6	4.5
Eagles	50	13.5	12	11	8	6	4.5
Harmony	54	14	12.5	11	8.5	6.5	4.5
Knightsville	55	14	12.5	11	8.5	6.5	4.5
Brazil	57	14.5	11	11.5	8.5	6.5	5
Turner	59	14.5	13	11.5	8.5	6.5	5
Stauton	61	14.5	13	11.5	8.5	6.5	5
Cloverland	62	15.5	14	12.5	9.5	7	5
Seeleyville	65	15.5	14	12.5	9.5	7	5
Prairie	71	16	14.5	13	9.5	7	5.5
Terre Haute	73	16.5	15	13	10	7.5	5.5
Macksville	75	16.5	15	13	10	7.5	5.5
Liggett	77	17	15.5	13.5	10	7.5	5.5
Nelson	79	17	15.5	13.5	10	7.5	5.5

That a duly certified copy of said finding and order was immediately thereafter served upon and delivered to the defendant the Vandalia Railroad Company.

13 That thereafter on the 22nd day of January, 1907, The Vandalia Railroad Company filed its certain Bill of Equity in the United States Circuit Court in and for the District of Indiana, against said Railroad Commission of Indiana. Elliott R. Hooten, Prosecuting Attorney of Marion County in the State of Indiana, Gustav A. Schnull, William J. Griffin, and George G. Griffin, wherein it averred the filing of the application of said Schnull, Griffin and Griffin, doing business as Schnull & Co., before said Railroad Commission of Indiana, for the reduction of the rates and charges established by said Vandalia Railroad Company and in force upon its said line of road hereinbefore mentioned and described at the time of the filing of such application, and of the finding and the order thereon made by said Railroad Commission as

hereinbefore set forth; and averred that the rates theretofore established by it, as hereinbefore set out were entirely reasonable, and the rates established by the order of the Railroad Commission of Indiana, as hereinbefore set out, were not remunerative for the services required, but upon the contrary they were confiscatory and praying that said United States Circuit Court in and for the District of Indiana would declare said order of the Railroad Commission of Indiana to be void and of no force and effect, praying for a temporary injunction, enjoining all the defendants in said Bill, and all other persons
14 standing in the like relation as said defendant from instituting or prosecuting any suit or suits against said Vandalia Railroad Company for the recovery of any damages, overcharges or penalties under and by virtue of said order of the Railroad Commission of Indiana made and entered under date of December 14, 1906, heretofore set out, during the pendency of said suit, and that upon the final hearing of said suit, such injunction should be made perpetual.

That thereafter such proceedings were had in said cause, in said United States District Court in and for the District of Indiana, that on the 3rd day of May, 1907, it was ordered that said temporary injuction be denied. That thereafter such further proceedings were had in said cause that on the 29th day of June 1909 said United States Circuit Court in and for the District of Indiana entered its finding, judgment and decree, declaring that said order of the Railroad Commission of Indiana entered on the 14th day of December, 1906, be set aside and held void and of no force or effect as and from the date thereof; and that all of the defendants in said cause and all other persons standing in like relation should be perpetually enjoined and restrained under the authority of said order of said Railroad Commission of Indiana.

That thereafter the defendants in said suit took and prosecuted an appeal from the Judgment and decree of the United States
15 Circuit Court in and for the District of Indiana to the Supreme Court of the United States, with such effect that the judgment and decree of said Circuit Court, was by the Supreme Court of the United States on the 26th day of October, 1913, in all things reversed, and said cause remanded to said Court with directions to dismiss said cause without prejudice.

That the mandate of the Supreme Court of the United States in said cause, was on the first day of December, 1913, filed in the Circuit Court of the United States in and for the District of Indiana, whereupon said last named Court entered its order, judgment and decree dismissing said cause without prejudice.

And these plaintiffs further show to the Court, that the defendant The Vandalia Railroad Company never took any appeal from said order of the Railroad Commission, nor brought any suit in any Court to test the validity of said order, other than the suit brought in the United States District Court in the State of Indiana, from the decree in which, appeal was aken to the Supreme Court of the United States, where said decree was reversed in manner and from as hereinbefore set forth. And the plaintiffs further show that said defend-

ant has never in any other suit in any Court sought to have said order annulled or the enforcement thereof enjoined.

16 And further avers notwithstanding the making of said order by said railroad Commission of Indiana hereinbefore mentioned, and said service thereof on said defendant, The Vandalia Railroad Company, said defendant has at all times refused to comply with said order and yet refuses to comply therewith, but has at all times since the making thereof continued and yet continues, to charge, collect and receive, for its services in the handling and transportation of freight covered by such classified rates, the rates and charges established by it for such services prior to the making of said order, and has at all times refused to accept and yet refuses to accept the compensation by said order of the Railroad Commission entered on the 14th day of December, 1906, fixed and prescribed for the handling and transportation of said classes of freight over said line of its roads.

That the total amount of freights charged and collected by the defendant from shippers of such classified freights on its line of Railroad in the State of Indiana, as the plaintiffs are informed and believe is in excess of the sum of one hundred thousand dollars per annum, of which amount thirty four per cent is in excess of the rates prescribed by said order of the Railroad Commission of Indiana, all to the detriment, damage and injury of the persons required to pay such excess of freights and to the citizens of the State of Indiana.

17 That Gustav A. Schnull, William J. Griffin and George G. Griffin as partners doing business under the name of Schnull & Co. have during all said period from the first day of February 1907 until now been and yet are engaged in the wholesale grocery business in the City of Indianapolis, making constant shipments of freight, belonging to the classes named in said order of said Railroad Commission of Indiana, a copy whereof is hereinbefore set out, over the line of said Vandalia Railroad Company as hereinbefore set out to the various stations and points of delivery thereon and directly interested in the rates and charges to be paid for the handling and transportation of such freights; in some instances paying such freights at the City of Indianapolis. In other cases such charges for transportation are paid by the consignee of such goods so shipped. In many of such cases, where the cost of transportation is paid by the consignees, the amount of such charges affects and lessens the prices *at* which said Schnull & Co. can receive for their goods; and in all cases the amounts charged for such freights and transportation affect and increase the cost of such goods thus shipped to the consumer.

That each of the other persons named as plaintiffs herein are engaged in some line of business in the prosecution of which they either ship or receive goods, carried over the line of said Van-

18 dalia Railroad Company or some part thereof within the State of Indiana and in the conduct of their business are affected in the same manner as is the firm of Schnull & Co. as hereinbefore set out.

That in addition to the persons hereinbefore named as plaintiffs, a very large number of other persons are affected in the like manner and such persons are so numerous that it would be very inconvenient, if not absolutely impracticable, to join them in one suit and to require each of said persons to institute his individual suit would require a very large number of such suits to be brought to secure adequate relief, with attendant costs, and cast a large amount of labor upon the courts of the State of Indiana. That there is no adequate relief to all the persons interested in the proper enforcement of such order, except to enjoin said defendant from collecting from the plaintiffs herein and from any other person or persons standing in the like situation who shall make themselves a party to this cause and seek the benefits thereof, any other charges for the handling and transportation of goods in the various classes mentioned in said order, than those prescribed by said order of said Railroad Commission entered and made on the 14th day of December, 1906, to become effective on the 1st day of February, 1907, and to require said defendant to receive and transport all of the classes of goods
19 named and described in said order tendered by the parties to this action or by any person or persons becoming parties thereto and seeking the benefits thereof for transportation, for and upon the rates in said order prescribed.

Wherefore, the plaintiff- pray the court, on the final hearing of this cause, to enter its decree, perpetually enjoining the defendant from charging or receiving from the parties to this suit or any person or persons making themselves parties thereto and seeking to derive benefits thereunder any other compensation for the receiving, handling, transporting and delivering, goods or other freights of the character and description set forth in the several classes mentioned and described in said order entered by said Railroad Commission of Indiana on the 14th day of December 1906, to become effective on the 1st day of February, 1907, and requiring said defendant The Vandalia Railroad Company, to receive and transport all of the classes *od* goods named and described in said order, tendered for transportation by the parties to this action or by any person or persons becoming parties thereto and seeking to derive benefits thereunder, for and upon the rates in said order prescribed; and that the court will set an early day upon which it will hear the plaintiff's motion for a temporary injunction, enjoining and restraining said defendant from charging, collecting or receiving from shippers or
20 receivers of freight any greater or other charges for its services for handling and transporting such classified freights upon its said line of railway, than those prescribed and set forth in said order of the Railroad Commission of Indiana, until the final hearing of this cause and until said defendant shall have put into effect such schedule of rates prescribed by the Railroad Commission of Indiana for the handling and transporting of such classified freights over the said line of its road, and for all other proper relief.

SMITH, REMSTER, HORNBROOK & SMITH,

Attorneys for Plaintiffs.

George G. Griffin being duly sworn upon his oath says that he is authorized to make this affidavit on behalf of the plaintiffs, that he has read the foregoing complaint and knows its contents, and that the averments therein contained are true as he verily believes.

GEORGE G. GRIFFIN.

Subscribed and sworn to before me the undersigned a Notary Public in and for said County and State this 25th day of August, 1915.

WALTER S. GLASS,
Notary Public.

[SEAL.]

My commission expires on the 8th day of July, 1916.

21 And be it remembered, that afterwards, to wit: on the 10th day of September, 1915, before the Honorable Louis B. Ewbank, sole Judge of said Circuit Court, the following proceedings were had in said cause, to wit:

Order Transferring Case to Superior Court.

"Come the plaintiffs and the defendant was ruled to answer by September 18, 1915."

And afterwards to wit on the 23rd day of September, 1915, being the 16th judicial day of the September Term, 1915, of said court before the same honorable judge thereof, the following proceedings were had herein, viz:

"There being more cases filed in this court during the present and preceding terms of said court than can be disposed of with expedition, and in the opinion of the court an early disposition of the case hereinafter designated by number is required. It is now therefore ordered by the court that cause Number 25585 be transferred to the Superior Court of Marion County, Indiana, and there redocketed and disposed of the same as if originally filed in said Superior Court."

And afterwards to wit on the 25th day of September, 1915, being the 18th judicial day of the September Term, 1915, of the Marion Superior Court, Room 2, before the Honorable Linn D. Hay judge thereof, the following proceedings were had herein, viz:

22 "Comes now the defendant by counsel and files a demurrer to the plaintiffs' complaint herein, which demurrer is as follows:

STATE OF INDIANA,
County of Marion, ss:

In the Marion Superior Court, September Term, 1915.

Room No. 2.

No. 100,535.

GUSTAV A. SCHNULL and Others, Plaintiffs,
vs.
VANDALIA RAILROAD COMPANY, Defendant.

Defendant's Demurrer to Plaintiff's Complaint.

Vandalia Railroad Company, defendant in the above entitled cause, demurs to the complaint of the plaintiffs herein, and for cause of demurrer says:

That said complaint does not state facts sufficient to constitute a cause of action against defendant for the following reasons, to wit:

1. The plaintiffs, neither individually nor collectively, have any right, power or authority to institute and prosecute in their names an action for a mandatory injunction against defendant to require defendant to comply with an order of the Railroad Commission of Indiana purporting to prescribe rates for the transportation of freight to be charged and collected by defendant.

2. The plaintiffs, neither individually nor collectively, have any right, power or authority to institute and prosecute in their
23 names the cause of action set out in their complaint.

3. The plaintiffs, neither individually nor collectively, have any right, power or authority by an action for a mandatory injunction or otherwise instituted and prosecuted in their names to enforce compliance with an order made by the Railroad Commission of Indiana prescribing rates which shall be charged and collected by a common carrier for the transportation of freight.

4. The plaintiffs, neither individually nor collectively, have any power, right or authority to institute and prosecute in their names an action for a mandatory injunction to compel defendant to obey and comply with the order of the Railroad Commission of Indiana set out in plaintiff's complaint and which was made and entered on December 14, 1906, and which by its terms was to become effective on February 1, 1907.

5. The complaint does not show that the order of the Railroad Commission of Indiana set out in said complaint and which was made an- entered on December 14, 1906, and which by its terms was to become effective on February 1, 1907, is a valid, subsisting and enforcible order.

6. The complaint does not show that the rates prescribed in the order of the Railroad Commission of Indiana set out in said com-
plaint, and which was made and entered on December 14,
24 1906, and which by its terms was to become effective on February 1, 1907, are legal rates which defendant now can be lawfully required to charge and collect.

7. The order of the Railroad Commission of Indiana set out in the complaint herein and which was made and entered on December 14, 1906, and which by its terms was to become effective on February 1, 1907, expired by operation of law on February 1, 1909, on which date said order ceased to have any force or effect whatever.

8. The plaintiffs have no right, power nor authority to prosecute a single action in their names jointly, wherein they seek to enforce separate rights of action given to them individually and respectively by the Act of the General Assembly of Indiana concerning the Railroad Commission of Indiana, approved February 28, 1905, being Chapter 53 of Acts 1905.

D. P. WILLIAMS,
S. O. PICKENS,
Attorneys for Defendant.

Defendant respectfully requests the Court to hear oral argument on the foregoing demurrer.

D. P. WILLIAMS,
S. O. PICKENS,
Attorneys for Defendant.

GUSTAV A. SCHNULL and Others, Plaintiffs,

25 And afterwards to wit on the 12th day of November, 1915, being the 11th judicial day of the November Term, 1915, of said court before the same honorable judge thereof, the following proceedings were had herein, viz:

"Come the parties and the court being duly advised, overrules the defendant's demurr- to the complaint, to which ruling of the court the defendant at the time excepts. The court now rules the defendant to answer the plaintiff's complaint by November 19, 1915."

And afterwards to wit on the 13th day of December, 1915, being the 7th judicial day of the December Term, 1915, of said court before the same honorable judge thereof, the following proceedings were had herein, viz:

"Defendant files answer in three (3) paragraphs to the complaint as follows:

STATE OF INDIANA,
County of Marion, ss:

In the Marion Superior Court, December Term, 1915.

No. 100,535.

Room No. 2.

GUSTAV A. SCHNULL and Others, Plaintiffs,

vs.

VANDALIA RAILROAD COMPANY, Defendant.

Defendant's Answer to Complaint.

26 Vandalia Railroad Company, defendant in the above entitled cause for answer to plaintiffs' complaint says:

Paragraph 1. That it denies each and every material allegation in said complaint contained.

Paragraph No. 2. For a further and second paragraph of answer to plaintiff's complaint, Vandalia Railroad Company, defendant herein, says:

That the rates specified in the order mentioned in said complaint and which was made and entered by the Railroad Commission of Indiana on the fourteenth (14th) day of December, 1906, and which by its terms was to become effective on the First (1st) day of February, 1907, will not yield to defendant revenue sufficient to reimburse defendant for its actual cost and outlay in handling and carrying the classes of property specified in said order of said Railroad Commission, and provide a fair return to defendant on the value of defendant's property used and employed in handling and carrying the classes of property in said order specified.

And defendant further says that under Section 1 of Article 14 of the Constitution of the United States, defendant cannot be lawfully deprived of its property without due process of law, nor be deprived of the equal protection of the laws; and that if the rates specified in said order of the Railroad Commission of Indiana be enforced

27 defendant will be compelled to handle and carry said classes of property in said order specified without deriving or receiving therefrom revenue sufficient to pay the actual cost to defendant of handling and carrying said classes of property and provide a fair return to defendant on the value of defendant's property used and employed in handling and carrying said classes of property, and defendant will thereby be deprived of its property without due process of law in violation and contravention of said Section 1 of Article 14 of the Constitution of the United States.

Wherefore, defendant says that the rates specified in said order, of said Railroad Commission of Indiana, and likewise said order,

are illegal and void, and prays to be hence dismissed and that it have judgment herein against plaintiffs for all its costs and charges herein laid out and expended.

Paragraph 3. For a further and third paragraph of answer to plaintiff's complaint, Vandalia Railroad Company, defendant herein, says:

That within sixty (60) days after the taking effect of the act of the General Assembly of the State of Indiana entitled: "An Act to amend sections one, two, three, four, five, six, seven, eight, ten, eleven, twelve, thirteen, fourteen, fifteen, eighteen, nineteen, twenty, twenty-one, and twenty-three, and to repeal section six and one-half and to amend the title of an act entitled 'An Act providing
28 for the creation of a railroad commission, the appointment and compensation of the members thereof, prescribing the powers and duties of such commission and its members, prescribing certain duties and obligations of railroad companies, express companies and other common carriers, defining certain misdemeanors and prescribing penalties, providing for the collection of penalties by civil action from railroad companies and other common carriers by the state in cases therein provided for, appropriating money to carry out its provisions, providing for a review of the decisions of the commission and conferring jurisdiction on certain courts to hear and determine such proceedings, and repealing all laws and parts of laws in conflict therewith,'" approved March 9, 1907, and in pursuance of the requirements of said act defendant caused to be printed in plain type and filed with the Railroad Commission of Indiana schedules showing the rates and charges for the transportation of each and all of the classes of property specified in the complaint herein, and which rates and charges defendant had established and which were in force at that time between all of the points on its line in the State of Indiana mentioned in said complaint.

And defendant further says that ever since the taking effect of the act aforesaid of the General Assembly of the State of Indiana, defendant has kept and does now keep on file pursuant to the
29 requirements of said act with the Railroad Commission of Indiana and with its successor, the Public Service Commission of Indiana, schedules printed in plain type showing the rates and charges for the transportation of each and all of the classes of property specified in said complaint, and which defendant has established and which were and are in force between all of the points on its line in the State of Indiana mentioned in said complaint. That ever since the taking effect of the act aforesaid, defendant has also kept on file and does now keep on file for the use of the public in every station, depot and office of defendant where the classes of property specified in said complaint are received for transportation and where agents are regularly maintained, and in such form as to be accessible to the public and where they can be conveniently inspected, copies of said schedules of the rates and charges which defendant has kept and does now keep on file with said Railroad Commission of Indiana and with its successor, said Public Service Commission of Indiana as aforesaid.

And defendant further says that ever since the taking effect of the act aforesaid of the General Assembly of the State of Indiana, it has charged, demanded and collected and does now charge, demand and collect for the transportation of the said classes of property specified in said complaint, the rates and charges and only the rates and charges shown in and by the said schedules of rates and charges for the transportation of said classes of property which defendant has kept and does now keep on file with said Railroad Commission of Indiana and with said Public Service Commission of Indiana as aforesaid. That the rates and charges which defendant has received, demanded and collected and which it now receives, demands and collects for the transportation of the said classes of property aforesaid, and which rates and charges are and at all times herein mentioned have been the rates and charges shown in and by the said schedules which defendant has kept and does now keep on file as aforesaid, are not now and never have been the rates and charges set out in plaintiff's complaint herein and which plaintiffs are seeking herein to compel defendant to charge, demand and collect for the transportation of the said classes of property aforesaid.

And defendant further says that it has at all times charged, demanded and received from plaintiffs and does now charge, demand and receive from them for the transportation over its line between the points in the State of Indiana mentioned in said complaint of the said classes of property specified in said complaint the rates and charges and only the rates and charges shown in and by said schedules thereof which defendant has kept and does now keep on file with said Railroad Commission of Indiana and its successor, said Public Service Commission of Indiana.

Wherefore, defendant says that the rates and charges which defendant has charged, demanded and collected, and which it now charges, demands and collects for the transportation of the said classes of property specified in the complaint herein are the lawful and legal rates and charges therefor, and that the plaintiffs herein have not been and are not now damaged in any manner because defendant has charged, demanded and collected from them and does now charge, demand and collect from them the said rates and charges aforesaid, and defendant prays to be hence dismissed and that it have judgment herein against plaintiffs for all its costs and charges herein laid out and expended.

S. O. PICKENS,
D. P. WILLIAMS,
Attorneys for Defendant.

"The Court now rules the plaintiff to reply to the second and third paragraph of the defendant's answer on or before December 21st, 1915."

And afterwards towit on the 21st day of December, 1915, being the 14th judicial day of the December Term, 1915, of said court before the same honorable judge thereof, the following proceedings were had herein, viz:

"Comes now the plaintiff by counsel and files joint and several demurrers to each second and third paragraph of the defendant's answer, as follows:

32 STATE OF INDIANA,
Marion County, ss:

Marion Superior Court.

Room No. 2.

Cause No. 100,535.

GUSTAV A. SCHNULL et al.

vs.

VANDALIA RAILROAD COMPANY.

Demurrer to Second Paragraph of Answer.

The plaintiffs jointly and severally demur to the second paragraph of answer of the defendant the Vandalia Railroad Company and for cause of demurrer say, that said second paragraph of answer does not state facts sufficient to constitute a cause of defense to the cause of action set forth in the complaint in this cause.

SMITH, REMSTER, HORNBROOK & SMITH,

Attorneys for the Plaintiffs.

Memorandum filed under the statute stating the particulars, in which such second paragraph of answer is insufficient to constitute a defense. Such paragraph of answer is insufficient;

1st. That it does not state that the order of the Railroad Commission therein referred to was unremunerative and was confiscatory at the time it was made, or at the time this suit was brought, but simply such was the fact at the time the answer was filed.

2nd. In that it does not aver that the rates established and fixed by such order, would not at the time the order was made, or
33 at the time of the bringing of this suit, produce revenues sufficient to pay the cost of the transportation of the property to which such rates were applicable and leave the defendant a fair return upon the value of the defendant's property used and employed in the handling and carrying of the classes of property in said order specified.

3rd. That the averments therein contained "That the rates specified in the order mentioned in said complaint and which was made and entered by the Railroad Commission of Indiana on the 14th day of December, 1906, and which by its terms was to become effective on the 1st day of February, 1907, will not yield to defendants revenue sufficient to reimburse defendant for its actual cost and outlay in handling and carrying the classes of property specified in

said order of said Railroad Commission, and provide a fair return to the defendant on the value of the defendant's property used and employed in handling and carrying the classes of property in said order specified, states no issue of fact, but the mere conclusion of the pleader as to a material fact.

SMITH, REMSTER, HORNBROOK & SMITH,

Att'ys for Plaintiff.

STATE OF INDIANA,
Marion County, ss:

Marion Superior Court, Room No. 2.

Cause No. 100,535.

34

GUSTAV A. SCHNULL et al.

vs.

VANDALIA RAILROAD COMPANY.

Demurrer to 3rd Paragraph of Answer.

The plaintiffs jointly and severally demur to the third paragraph of answer to the complaint herein and for cause of demurrer say, that said paragraph of answer does not state facts sufficient to constitute a cause of defense, to the cause of action set forth in the complaint in this cause.

SMITH, REMSTER, HORNBROOK & SMITH,

Attorneys for Plaintiffs.

Memorandum Required by the Statute.

The allegations of the answer are insufficient to state a cause of defense to the cause of action set forth in the complaint herein in this, that the facts therein averred, show merely that within 60 days after taking effect of the act of the general assembly of the State of Indiana, title of which is set forth in said answer, approved March 9, 1907, caused to be printed and filed with the R. R. Commission of Indiana and posted in its various offices schedules showing the rates and charges for the transportation of each and all of the classes of property mentioned in the complaint, and that it thenceforward charged such rates for the transportation of such freights. The answer does not profess to set out such schedule of rates.

If such schedule of rates for the classes of freights men-
35 tioned in the complaint in this cause varied in any respect from the rates prescribed in said order of the Railroad Commission set out in the complaint, then such schedules thus alleged to have been filed and published were thus far unlawful and invalid under the laws of the State of Indiana and constitute no defense to this action. The mere continuance in such wrongful conduct does not constitute a defense.

If it so be that the rates charged under the schedule referred to in the answer, are the same rates prescribed by the order of the Railroad Commission referred to in the pleadings, then such fact could be proven under the general denial.

SMITH, REMSTER, HORNBROOK & SMITH,

Attys for Plaintiff.

And afterwards towit on the 27th day of June, 1916, being the 29th judicial day of the June Term, 1916, of said court before the same honorable judge thereof, the following proceedings were had herein, viz:

"Come the parties, and by agreement of all parties, plaintiff files a demurrer to the second paragraph of the defendant's answer to be shown as filed on December 21, 1915, which demurrer is as follows:

STATE OF INDIANA,
Marion County, ss:

Marion Superior Court, Room No. 2.

36

Cause No. 160,535.

GUSTAV A. SCHNULL et al.

vs.

VANDALIA RAILROAD COMPANY.

Demurrer to 2nd Paragraph of Answer.

The plaintiffs jointly and severally demur to the second paragraph of answer of the defendant the Vandalia Railroad Company and for cause of demurrer say, that said second paragraph of answer does not state facts sufficient to constitute a cause of defense to the cause of action set forth in the complaint in this cause.

Memorandum Filed under the Statute Stating the Particulars in which such Second Paragraph of Answer is Insufficient to Constitute a Defense.

Such paragraph of answer is insufficient:

1st. That it does not state that the order of the Railroad Commission therein referred to was unremunerative and was confiscatory at the time it was made, or at the time this suit was brought, but simply such was the fact at the time the answer was filed.

2nd. In that it does not aver that the rates established and fixed by such order, would not at the time the order was made, or at the time of the bringing of this suit, produce revenues sufficient to pay the cost of the transportation of the property to which such rates

were applicable and leave the defendant a fair return upon the
37 value of the defendant's property used and employed in the handling and carrying of the classes of property in said order specified.

3rd. In that said 2nd paragraph of answer does not aver that the rates established and fixed by such order, for the handling and transportation of the respective classes of freight therein specified, taken in connection with all other rates for handling and transporting all classes of freight and transportation of passengers lawfully prescribed by the Railroad Commission of Indiana and its successor, the Public Service Commission of Indiana, do not afford an adequate and remunerative compensation sufficient to pay the cost of the handling and transportation of all classes of freight, and of passengers, covered by all such orders, and a fair return upon the value of the defendant's property employed and used in all such transportation.

4th. In that said 2nd paragraph of answer does not aver that the rates established and fixed by such order, for the handling and transportation of the respective classes of freight therein specified, taken in connection with all other rates for handling and transporting all classes of freight lawfully prescribed by the Railroad Commission of Indiana, and its successor, the Public Service Commission of Indiana, do not afford an adequate and remunerative compensation sufficient to pay the cost of transportation of all such classes of freight covered by all such orders, and a fair return upon the value of the de-
38 fendant's property employed and used in such transportation.

5th. That the averments therein contained—"That the rates specified in the order mentioned in said complaint and which was made and entered by the Railroad Commission of Indiana on the 14th day of December, 1906, and which by its terms was to become effective on the 1st day of February, 1907, will not yield to defendant's revenue sufficient to reimburse defendant for its actual cost and outlay in handling and carrying the classes of property specified in said order of said Railroad Commission, and provide a fair return to the defendant on the value of the defendant's property used and employed in handling and carrying the classes of property in said order specified, states no issue of fact, but the mere conclusion of the pleader as to a material fact.

SMITH, REMSTER, HORNBROOK & SMITH,
Attorneys for Plaintiffs.

Demurrers to 2nd and 3rd Pars. of Answer Sustained and Exception.

"And the court having seen and considered said demurrer and demurrer filed to the 3rd par of answer now sustains the demurrer to each second and third paragraphs of answer, to which rulings of the court the defendant at the time excepts.

The court now rules the defendant to answer as to its second and third paragraphs of answer by September 5, 1916."

39 And afterwards towit on the 13th day of November, 1916, being the 7th judicial day of the November term, 1916, of said court before the same honorable judge thereof, the following proceedings were had herein, viz:

Defendant's Election to Stand Upon Its 2nd & 3rd Pars. of Answer.

"Come now the parties by their attorneys aforesaid and the defendant Vandalia Railroad Company elects to stand upon its second and third paragraphs of answer to which demurrers have heretofore been sustained and declines to plead further."

Cause Submitted.

And afterwards to-wit on the 4th day of December, 1916, being the 1st judicial day of the December Term, 1916, of said court before the same honorable judge thereof, the following proceedings were had herein, viz:

"Come the parties by their respective counsel and this cause being at issue is now submitted to the Court for trial, finding and judgment.

The evidence being heard and concluded and the Court being duly advised in the premises now takes this cause under advisement."

And afterwards to-wit on the 23rd day of December, 1916, being the 18th judicial day of the December Term, 1916, of said court before the same honorable judge thereof, the following proceedings were had herein, viz:

40 *Finding for Plaintiff.*

"And now on this twenty-third (23rd) day of December, 1916, the same being the 18th judicial day of the December Term, 1916, of said Court, come again the parties, and the Court having considered the evidence, and the argument of counsel and now being advised in the premises finds for the plaintiffs, and that they are entitled to the decree of this Court enjoining the defendant the Vandalia Railroad Company from charging, collecting or receiving from the plaintiffs and others in like situation with the plaintiffs, any other charges for the handling and transportation of goods in the various classes mentioned and set forth in the order of the Railroad Commission of Indiana made and entered on the 14th day of December, 1906, to become effective on the 1st day of February, 1907, referred to in the complaint in this cause, as prayed for in said complaint.

Judgment and Decree.

It is therefore, here and now accordingly considered, ordered, adjudged and decreed by the Court that the defendant Vandalia Railroad Company be and is now hereby perpetually enjoined from

charging, collecting or receiving from the plaintiffs in this cause or any other person or persons standing in the like situation as do the plaintiffs for the handling and transportation of freights in the various classes of classified freights set out in the order of the Railroad Commission made and entered on the 14th day of De-
41 cember, 1906, to become effective on the 1st day of February, 1907, rates in excess of the rates for such handling and transporting the same, fixed and set down in such order, per one hundred pounds stated in cents as follows, towit:

From Indianapolis to Stations Names.

	Miles.	Classes. 1st.	2nd.	3rd.	4th.	5th.	6th.
Ben Davis	6	8	7	6.5	5	3.5	2.5
Bridgeport	9	8.5	7.5	7	5	4	3
Oakplain	11	8.5	7.5	7	5	4	3
Plainfield	14	9	8	7	5.5	4	3
Gibson	15	9	8	7	5.5	4	3
Cartersburg	17	9.5	8.5	7.5	5.5	4.5	3
Clayton	20	9.5	8.5	7.5	5.5	4.5	3
Pecksburg	23	10.5	9.5	8.5	6.5	4.5	3.5
Amo	25	10.5	9.5	8.5	6.5	4.5	3.5
Coatsville	28	11	10	9	6.5	5	3.5
Fillmore	33	11.5	10.5	9	7	5	4
Alemeda	36	12	11	9.5	7	5.5	4
Greencastle	39	12	11	9.5	7	5.5	4
Limedale	40	12	11	9.5	7	5.5	4
Hamrick	44	13	12	10.5	8	6	4.5
Reelsville	47	13.5	12	11	8	6	4.5
Eagles	50	13.5	12	11	8	6	4.5
Harmony	54	14	12.5	11	8.5	6.5	4.5
Knightsville	55	14	12.5	11	8.5	6.5	4.5
Brazil	57	14.5	13	11.5	8.5	6.5	5
42 Turner	59	14.5	13	11.5	8.5	6.5	5
Staunton	61	14.5	13	11.5	8.5	6.5	5
Cloverland	62	15.5	14	12.5	9.5	7	5
Seeleyville	65	15.5	14	12.5	9.5	7	5
Prairie	71	16	14.5	13	9.5	7	5.5
Terre Haute	73	16.5	15	13	10	7.5	5.5
Macksville	75	16.5	15	13	10	7.5	5.5
Liggett	77	17	15.5	13.5	10	7.5	5.5
Nelson	79	17	15.5	13.5	10	7.5	5.5

Judgment and Decree.

And it is further considered, ordered and adjudged by the Court that the defendant Vandalia Railroad Company shall pay the costs of this suit.

All of which is finally ordered, adjudged and decreed.

And thereupon defendant now files its verified petition praying the Court to suspend the operation of the foregoing decree and injunction pending an appeal of this cause, and until the final determination of this cause on appeal in the Court of last resort, which petition is in the words and figures following, that is to say:

Defendant's Petition to Suspend Operation of Decree and Injunction.

STATE OF INDIANA,
County of Marion, ss:

In the Marion Superior Court, December Term, 1916.

Room No. 2.

No. 100,535.

43 GUSTAV A. SCHNULL et al., Plaintiffs,

vs.

VANDALIA RAILROAD COMPANY, Defendant.

Petition of Defendant for Suspension of Decree and Injunction Pending Appeal.

Vandalia Railroad Company, the defendant in the above entitled cause, presents this its petition for a suspension of the final decree and injunction entered by the Court herein on the — day of December, 1916, pending the final determination of this cause on appeal to the Supreme Court of the State of Indiana, or on writ of error to said Supreme Court of the State of Indiana by the Supreme Court of the United States, and to that end said Vandalia Railroad Company, the petitioner herein respectfully shows and represents:

1. That the rates prescribed in the order of the Railroad Commission of Indiana, made and entered by said Commission December 14, 1906, to become effective February 1, 1907, which order is set out in the complaint herein and mentioned and described in the final decree herein, are approximately thirty-four (34) per cent. less than the rates heretofore in force and now in force for the transportation of the same classes of freight specified in such order as fixed by the schedules and tariffs of rates for the transportation of said classes of freight heretofore filed by your petitioner with the
44 Railroad Commission of Indiana, and now on file with the Public Service Commission of Indiana, the successor of said Railroad Commission of Indiana as required by the Statutes of the State of Indiana in such cases made and provided; that the said rates so specified in said schedules and tariffs on file with said Commission are the rates which defendant has been charging, collecting and receiving for the transportation of said classes of freight ever since said schedules and tariffs were so filed as required by law, and are the rates which defendant will be compelled to charge and collect

as required by the statutes of the State of Indiana in such cases made and provided and now in force; that if your petitioner is compelled to adopt and put into effect pending the final determination of this cause, the rates specified in said order of said Railroad Commission and in the said final decree herein, the revenue which will thus accrue to your petitioner for handling and transporting said classes of freight will be reduced approximately thirty-four (34) per cent. below the revenue which your petitioner would receive from handling and transporting said classes of freight at the rates specified in your petitioner's schedules and tariffs now on file with said Public Service Commission of Indiana as required by law; and in the event that the said final decree entered herein should be reversed either in the Supreme Court of Indiana, or in the Supreme Court of the United States, your petitioner will have then lost a large
45 amount of money, the exact amount of which it is impossible at this time to definitely determine.

2. And your petitioner further shows that if it is required to put into effect the said rates specified in said order of the said Railroad Commission and in the said final decree herein, pending a final determination of this cause in the Supreme Court of Indiana, or in the Supreme Court of the United States, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, whose railroad parallels your petitioner's railroad between the City of Indianapolis and the City of Terre Haute in the State of Indiana, in order to meet the intense competitive conditions that will be created thereby, will be compelled to readjust the rates now fixed by its schedules and tariffs on file with the Public Service Commission of Indiana for the transportation of the classes of freight specified in said order and said final decree herein, and which rates are higher than the said rates specified in said order and said decree, by reducing its rates, which reduction will result in the loss to said Cleveland, Cincinnati, Chicago and St. Louis Railway Company, which is not party to this suit, of a large amount of revenue, the exact amount of such loss, however, not being susceptible of accurate determination at this time.

3. Your petitioner further shows that if it is required to adopt and put into effect pending the final determination of this cause
46 in the Supreme Court of Indiana, or in the Supreme Court of the United States, the rates specified in said order of said Railroad Commission and in said final decree, your petitioner will, unless it re-adjusts in the method and manner now required by law, the rates now provided for in its schedules and tariffs now on file with the Public Service Commission of Indiana, for the transportation of the same classes of freight to and from stations on your petitioner's Michigan Division, Vincennes Division, and Butler Branch of said Michigan Division in the State of Indiana, and unless your petitioner also causes to be re-adjusted in the method and manner now provided by law the joint rates specified in the schedules and tariffs of joint rates, to which your petitioner and other common carriers in the State of Indiana are parties, and which are now on file with said Public Service Commission, for the transportation of

the same classes of freight, be subjected to the risk of prosecutions and suits to recover penalties and damages for and on account of discrimination as between shippers of said classes of freight and as between localities to and from which said classes of freight are transported.

Your petitioner further shows that the rates specified in said order of said Railroad Commission and in the final decree herein, apply only to the transportation of the classes of freight in said
47 order and said decree specifically from Indianapolis in the State of Indiana, when moving west to the town of Nelson in the State of Indiana, or when moving west from said City of Indianapolis to the several stations on your petitioner's line intermediate to said town of Nelson; that if your petitioner is required to adopt and put into effect, pending the final determination of this case in the said Supreme Court of Indiana, or in said Supreme Court of the United States, the said rates as specified in said order of said Railroad Commission and in the said final decree herein, it will also have to adopt and put into effect similiar rates for the transportation of the same classes of freight moving east from said town of Nelson to said City of Indianapolis, and from the said town of Nelson to points of your petitioner's line intermediate to said City of Indianapolis; that unless your petitioner could re-adjust said rates for the transportation of said classes of freight moving east from said town of Nelson to said City of Indianapolis and said stations intermediate to said City, the shippers of said classes of freight in said town of Nelson and in all of said towns intermediate to Indianapolis would be subjected to great discrimination and great loss and hardship as between themselves and the shippers of the same classes of freight in said City of Indianapolis and towns intermediate to said town of Nelson, and whose shipments of said classes of freight moved west
48 as aforesaid.

4. And your petitioner further shows that if it is required to adopt and put into effect pending the final determination of this cause in the Supreme Court of Indiana, or in the Supreme Court of the United States, the rates specified in the said order of said Railroad Commission and in the said final decree herein, for the transportation of the classes of freight therein specified, your petitioner's loss and damage in the event the said final decree herein should be reversed will be very great and will be irremediable, because your petitioner, will, as your petitioner is advised, have no right of action to recover back the difference between the said rates as specified in said order and said decree and the rates fixed in your petitioner's said schedules and tariffs now on file with the Public Service Commission of Indiana; and that if your petitioner should have such right of action, your petitioner will be forced to bring a multiplicity of actions and suits at a great and burdensome cost and expense to your petitioner.

5. And your petitioner further shows to the Court that unless the operation of said final decree herein and the operation of the injunction entered in said final decree be suspended pending the final determination of this cause either in the Supreme Court of the State

of Indiana, or in the Supreme Court of the United States,
49 your petitioner will sustain great and irremediable loss and damage in the event said final decree should be finally reversed, and that your petitioner will also be subjected to the risk of prosecutions and actions at law to recover penalties and damages under the laws of the State of Indiana and under the laws of the United States for and on account of discrimination as between shippers and as between localities; and that all of such loss and damage aforesaid and the risk of such prosecutions and actions at law aforesaid, can be avoided without any risk, danger or inconvenience to the plaintiffs herein by suspending the operation of said final decree and said injunction pending the final determination of this cause either in said Supreme Court of Indiana or in said Supreme Court of the United States.

And your petitioner further shows that it is now prepared and is ready to file herein its motion for a new trial and that it will promptly take and perfect and duly prosecute with all reasonable dispatch an appeal from the said final decree herein to the Supreme Court of Indiana, and that in the event said Supreme Court of Indiana shall finally affirm and sustain the said final decree herein, your petitioner will duly apply for a writ of error to be issued out of the Supreme Court of the United States to said Supreme Court of Indiana, and if your petitioner's application for said writ of error be granted, your petitioner will duly prosecute such writ of
50 error to a final hearing and determination in said Supreme Court of the United States.

And your petitioner further shows that it is ready and willing, and hereby offers to execute a bond with sufficient surety to be approved by the Court, and in such amount to be approved by the Court, payable to the plaintiffs herein for the benefit of said plaintiffs, and for the benefit of all persons standing in the like situation as do the plaintiffs, conditioned that if your petitioner fails to prosecute said appeal to said Supreme Court of Indiana and said writ of error in said Supreme Court of the United States to effect, your petitioner will promptly pay to said plaintiffs and said persons standing in the like situation as said plaintiffs, such amounts as your petitioner may collect from them for the transportation of the said classes of freight in said order of said Railroad Commission and in said final decree specified, pending the final determination of this cause in said Supreme Court of Indiana or in said Supreme Court of the United States, over and above the said rates as fixed in said order of said Railroad Commission and in said final decree for the transportation of said classes of property as provided for in said order and in said decree.

Wherefore, your petitioner prays this Court to suspend, pending the final determination of this cause in the Supreme Court of
51 Indiana or in the Supreme Court of the United States, the operation of the said final decree entered herein, and the op-

eration of the said injunction in said final decree provided for, upon the terms and conditions hereinbefore set forth.

VANDALIA RAILROAD COMPANY,
By D. P. WILLIAMS,
By S. O. PICKENS,
Its Attorneys.

STATE OF INDIANA,
County of Marion, ss:

C. B. Sudborough being first duly sworn according to law, upon his oath deposes and says:

That he is the General Freight Agent of Vandalia Railroad Company, the petitioner names in the foregoing Petition, and as such General Freight Agent he makes this affidavit for and in behalf of said Vandalia Railroad Company; that he has read the foregoing Petition, knows the contents thereof, and that the matters therein set forth and averred are true in substance and in fact, except those matters that are stated on information and belief, and as to all such matters he believes them to be true.

C. B. SUDBOROUGH.

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 13th day of December, A. D. 1916.

My commission will expire November 11, 1919.

52 [SEAL.]

BESSIE JACKSON,
Notary Public.

"And now plaintiffs file the affidavit of George G. Griffin, made on behalf of the plaintiffs and all persons similarly situated, in opposition to said petition of defendant, which affidavit is in the words and figures following, that is to say:

STATE OF INDIANA,
County of Marion, ss:

Superior Court of Marion County, Room No. 2.

Cause No. 100,535.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN, GEORGE G. GRIFFIN, et al.

vs.

THE VANDALIA RAILROAD COMPANY.

Affidavit of George G. Griffin.

George G. Griffin being duly sworn on his oath says that he is one of the plaintiffs in the above entitled cause, and he makes this affidavit on behalf of the plaintiffs and all others standing in the same

situation as the plaintiffs touching the matters in controversy therein.

That all the matters and facts alleged in the complaint touching the making of the order by the Railroad Commission therein set out,
53 and the proceedings had in the United States Circuit Court in and for the District of Indiana, touching the validity of said order, and in the Supreme Court of the United States, upon appeal from the decree entered in the said United States Circuit Court in and for the District of Indiana; and the proceedings had in said United States Circuit Court, after said cause was remanded thereto, are true.

That after said cause was appealed to the Supreme Court of the United States, the appellants therein made formal application to have said cause advanced, and upon said application, the defendant, The Vandalia Railroad Company opposed such advancement, and caused a brief to be filed in said cause opposing such advancement, with the result that such cause was not advanced and the hearing of said cause was greatly delayed.

The affiant further says, that notwithstanding said cause was remanded to the United States Circuit Court for the District of Indiana with directions to dismiss said cause without prejudice, and that pursuant to such mandate said cause was dismissed by said United States Circuit Court for the District of Indiana, without prejudice, on the 1st day of December, 1913, the defendant, The Vandalia Railroad Company has never under the leave thus granted to it, filed any other suit or proceedings in the United States Circuit or District Court in and for the District of Indiana, to contest the valid-
ity of said order in the complaint in this cause set out. Nor
54 has it in any other Court brought any suit or proceeding to contest the validity of such order.

This affiant further says that the plaintiffs in this cause are injuriously affected by the refusal of the defendant The Vandalia Railroad Company to comply with said order, not only in that they and their customers are compelled to pay the increased charges for the transportation of freights covered by said classified rates, demanded and received by The Vandalia Railroad Company, but, also in this that, by reason of thus being compelled to pay such charges jobbers are at a disadvantage in competition offered by their competitors in business, dealing in goods, wares and merchandise, transportation of which are included, in such classified rates, and the retail dealers must pay a higher price for such merchandise.

GEORGE G. GRIFFIN.

Subscribed and sworn to before me the undersigned a Notary Public in and for said County, this 12 day of December, 1916.

[SEAL.]

CHAS. W. SMITH,
Notary Public.

My commission expires on the 9th day of November, 1919.

"And the Court having examined said verified petition of defend-
ant and said affidavit in opposition thereto, and having heard
55 argument of counsel, and being advised in the premises, now

sustains said petition in part, as hereinafter set out and now overrules said petition in part, as hereinafter set out, that is to say:

Order Suspending Decree & Injunction for 30 Days.

It is now ordered by the Court that the operation of the foregoing decree and injunction be suspended for the period of thirty (30) days from and after the date of the entry of this order, upon the condition that defendant within ten (10) days from and after this date, file in this Court its bond in the penal sum of Fifteen Thousand Dollars, with The Guarantee Company of North America as surety thereon, which sum and surety are now and hereby approved by the Court, conditioned that defendant will during the period of the suspension of said decree and injunction, as aforesaid, keep a full, true and complete record and account of all moneys received by defendant for the transportation and carriage by it of the classes of freight specified in the said order of the Railroad Commission of Indiana dated December 14, 1906, and mentioned and described in the foregoing decree and injunction herein, which record and account shall show the point of origin and point of delivery of each shipment of such freight, the name of the consignor and the name of the consignee, the total amount of money collected and received by defendant as compensation to it for transporting and carrying each of such shipments of such freight, and the amount of money so collected and received by defendant in excess of the amount
56 that would have been yielded to defendant had defendant transported and carried such classes of freight at and for the rates therefor fixed in and by said order of said Railroad Commission of Indiana dated December 14, 1906, and in and by the said decree and injunction herein, and that defendant will within thirty (30) days from and after the expiration of the said period of suspension of the foregoing decree and injunction, file with the Clerk of this Court a full, true and correct report of such record and account; and that in the event it shall be held upon the final determination of this cause in the court of last resort, that said order of said Railroad Commission of Indiana dated December 14, 1906, is legal and valid, or the rates therein and in the foregoing decree and injunction specified are legal and valid, defendant will within thirty (30) days from and after the date of such final determination of this cause, pay to the Clerk of this Court for distribution upon the order of this Court among the persons lawfully entitled to receive the same, such sum of money as shall be equal to the amount defendant shall have collected and received for the transportation and carriage of said classes of freight aforesaid, during said period of suspension of the foregoing decree and injunction in excess of the amount defendant would have received during said period had defendant transported and carried such classes of freight at and for the rates there-
57 for fixed in and by said order of said Railroad Commission of Indiana, dated December 14, 1906, and in and by the foregoing decree and injunction. And also further conditioned that the defendant will pay to the plaintiffs such further legal damages, if any, which plaintiffs may be lawfully entitled to recover,

sustained by the plaintiffs by reason of the suspension of said decree and injunction and of the defendant continuing, during such period, the acts enjoined by the decree. And if said defendant shall not within said days granted for that purpose file such bond, then said decree shall at once be in full force and effect.

Provided, always, however, and it is so further ordered by the Court, that this order is and shall be without any prejudice to defendant to apply to the Supreme Court of Indiana in such manner and form as defendant may deem or be advised to be proper or necessary, for a further suspension of said decree and injunction, or for a stay thereof. And in the event this cause shall be by the Supreme Court of Indiana remanded to this Court, defendant shall have, and is hereby given leave to apply to this Court for any modification of this order suspending the operation of said decree and injunction, or any modification of the terms and conditions hereof.

And it is further ordered that this order shall be without prejudice to plaintiffs herein, if they elect so to do, to oppose any
58 such application, as aforesaid, which defendant may make either to said Supreme Court of Indiana or to this Court.

And the Court now overrules defendant's said verified petition is so far as said petition is not sustained by the foregoing order.

Exceptions of Parties to Order Suspending Decree & Injunction.

And as to so much of the foregoing ruling of the Court as sustains in part defendant's said verified petition, plaintiffs now except.

And as to so much of the foregoing ruling of the Court as overrules in part defendant's verified petition, defendant now excepts.

And the defendant now files its motion to modify said order of suspension in so far as it requires the bond to be conditioned that the defendant will pay to the plaintiffs such further legal damages, if any, which plaintiffs may be lawfully entitled to recover, sustained by the plaintiffs by reason of the defendant's continuing during said period the acts enjoined by the decree, which motion is in the words and figures following, towit:

STATE OF INDIANA,
County of Marion, ss:

In the Marion Superior Court, December Term, 1916.

59

Room No. 2.

No. 100,535.

GUSTAV A. SCHNULL et al., Plaintiffs,

vs.

VANDALIA RAILROAD COMPANY, Defendant.

Defendant's Motion to Modify Order Suspending Operation of Final Decree.

Vandalia Railroad Company, defendant in the above entitled cause, respectfully moves the Court to modify the order on this day, towit, December 23, 1916, entered by the Court in the above entitled cause, suspending, for a period of thirty (30) days, the operation of the final decree and injunction on this day entered by the Court in this cause in the following particulars, towit:

By striking out of said order the part and portion thereof reading as follows, towit:

"And also further conditioned that the defendant will pay to the plaintiffs such further legal damages, if any, which plaintiffs may be lawfully entitled to recover, sustained by the plaintiffs by reason of the suspension of said decree and injunction and of the defendant continuing, during such period, the acts enjoined by the decree."

PICKENS, MOORES, DAVIDSON & PICKENS,
D. P. WILLIAMS,
Attorneys for Defendant.

60 *Motion to Modify Order of Suspension Overruled, and Exception.*

"And the court having considered said motion and now being advised in the premises, now overrules said motion, to which ruling the defendant now excepts."

And defendant files herein its written motion for a new trial of this cause, which motion is in the words and figures following, that is to say:

STATE OF INDIANA,
County of Marion, ss:

In the Superior Court of Marion County, Room 2.

No. 160,735.

GUSTAV A. SCHNULL et al.

vs.

VANDALIA RAILROAD COMPANY.

Defendant's Motion for New Trial.

Defendant Vandalia Railroad Company moves the Court for a new trial of the above entitled cause, on the following grounds:

1. That the decision of the Court is not sustained by sufficient evidence.

2. That the decision of the Court is contrary to law.

3. For error of law occurring at the trial and at the time excepted to by the defendant, in this: The error of the Court in admitting in evidence over the defendant's objection pages 1 to 17 inclusive, and each of said pages, of the transcript of the case of William J. Wood, et al., vs. Vandalia Railroad Company, in the Supreme Court of the United States, being Exhibit No. 2 in this cause.

61

4. For error of law occurring at the trial and at the time excepted to by the defendant, in this: The error of the Court in admitting in evidence over the defendant's objection a certified copy of the plaintiff's complaint in the case of Vandalia Railroad Company vs. Union B. Hunt, et al., in the Circuit Court of the United States for the District of Indiana.

5. For error of law occurring at the trial and at the time excepted to by the defendant, in this: The error of the Court in admitting in evidence the original petition filed by Schnull and Company before the Railroad Commission of Indiana, being Exhibit No. 3 in this cause.

6. For error of law occurring at the trial and at the time excepted to by the defendant, in this: The error of the Court in admitting in evidence over the defendant's objection a certified copy of the amended petition filed by Schnull and Company against Vandalia Railroad Company on August 30, 1887, being Exhibit No. 4 in this cause.

7. For error of law occurring at the trial and at the time excepted to by the defendant, in this: The error of the Court in admitting

in evidence over the defendant's objection the stipulation set
62 forth in the transcript of the case of William J. Wood, et al. vs. Vandalia Railroad Company, in the Supreme Court of the United States, at pages 198 to 199 of said transcript, being Exhibit No. 5 in this cause.

8. For error of law occurring at the trial and at the time excepted to by the defendant, in this: The error of the Court in admitting in evidence over the defendant's objection page 9 of the transcript in the case of William J. Wood, et al. vs. Vandalia Railroad Company, in the Supreme Court of the United States, being Exhibit No. 6 in this cause.

9. For error of law occurring at the trial and at the time excepted to by the defendant, in this: The error of the Court in admitting in evidence over the defendant's objection a certified copy of the summons issued by the Railroad Commission of Indiana and served on Vandalia Railroad Company in the matter of the petition of Schnull and Company against Vandalia Railroad Company, before said Railroad Commission, being Exhibit No. 7 in this cause.

10. For error of law occurring at the trial and at the time excepted to by the defendant, in this: The error of the Court in admitting in evidence over the defendant's objection a certified copy of letter o W. C. Downing, Superintendant of Vandalia Railroad Company, dated December 15, 1905, acknowledging receipt of a copy
63 of the order of the Railroad Commission of Indiana, being Exhibit No. 8 in this cause.

11. For error of law occurring at the trial and at the time excepted to by the defendant, in this: The error of the Court in admitting in evidence over the defendant's objection a certified copy of the decree of the Supreme Court of the United States on appeal in the case of William J. Wood, et al. vs. Vandalia Railroad Company, being Exhibit No. 9, in this cause.

12. For error of law occurring at the trial and at the time excepted to by the defendant, in this: The error of the Court in admitting in evidence over the defendant's objection a certified copy of the official action in the United States Circuit Court for the District of Indiana on the return of the mandate of the Supreme Court of the United States in the case of William J. Wood, et al. vs. Vandalia Railroad Company, being Exhibit No. 10 in this cause.

13. For error of law occurring at the trial and at the time excepted to by the defendant, in this: The error of the Court in admitting in evidence over the defendant's objection pages 41 and 42 of the transcript of the case of William J. Wood, et al. vs. Vandalia Railroad Company, being Exhibit No. 11 in this cause.

14. For error of law occurring at the trial and at the time excepted to by the defendant, in this: The error of the Court in admit-
64 ting in evidence over the defendant's objection pages 43 to 49, inclusive, and each of said pages, of the transcript of the

case of William J. Wood, et al. vs. Vandalia Railroad Company, being Exhibit No. 12 in this cause.

15. For error of law occurring at the trial and at the time excepted to by the defendant, in this: The error of the Court in admitting in evidence over the defendant's objection Exhibit No. 12-A in this cause, being a part of the transcript in the case of William J. Wood, et al. vs. Vandalia Railroad Company in the Supreme Court of the United States, beginning on page 77 of said transcript.

16. For error of law occurring at the trial and at the time excepted to by the defendant, in this: The error of the Court in admitting in evidence over the defendant's objection Exhibit No. 13 in this cause, being a tabulation of shipments by plaintiffs over Vandalia Railroad.

D. P. WILLIAMS,
PICKENS, MOORES, DAVIDSON & PICKENS,
Attorneys for Defendant.

Motion for New Trial and Exception.

"And the Court having examined defendant's said motion for a new trial and having heard argument of counsel thereon, and being advised in the premises now overrules such motion, to which ruling defendant now excepts.

Appeal Granted.

65 And now defendant prays an appeal herein to the Supreme Court of Indiana, which is granted upon defendant filing herein within twenty (20) days from the date hereof, its appeal bond conditioned as required by law in the penal sum of One Thousand Dollars ($1,000.00) with The Guarantee Company of North America, as surety thereon.

Appeal Bond and Surety Approved.

And the Court here and now approves said The Guarantee Company of North America as such surety on said appeal bond and likewise approves the aforesaid penal sum thereof.

20 Days Allowed for Filing Bills of Exception.

And the Court now grants and allows all the parties herein twenty (20) days from the date hereof within which to present and file bills of exception."

66 And afterwards towit on the 30th day of December, 1916, being the 24th judicial day of the December Term, 1916, of said court before the same honorable judge thereof, the following proceedings were had herein, viz:

Suspension Bond Filed.

"Comes now the defendant, Vandalia Railroad Company, and files its bonds herein in the penal sum of Fifteen Thousand Dollars ($15,000.00) duly executed by the defendant, Vandalia Railroad Company, as principal, and the Guarantee Company of North America as surety thereon, in accordance with the order entered herein, on the 23rd day of December, 1916, suspending the operation of the decree and injunction entered herein, on said 23rd day of December, 1916, for a period of thirty days (30) from and after the date of the entry of said order; and conditioned as in said order prescribed, which bond is now approved by the Court and it is in the words and figures following, towit:

Filed Jan. 15, 1917.
J. FRED FRANCE,
Clerk.

Suspension Bond.

Know all men by these presents: That Vandalia Railroad Company, a consolidated corporation organized and existing under the laws of the States of Indiana and Illinois, as Principal, and The Guarantee Company of North America, a corporation organized and existing under the laws of the State of New York, as Surety, are held and firmly bound unto Gustav A. Schnull, William J. Griffin, George G. Griffin, composing the firm of Schnull & Co., Lawrence A. Busby, Charles F. Zies, William Ralph Elliott, Arthur W. Jones,
67 Simon F. Gonter, and Joseph S. Gonter, composing the firm of S. F. Gonter & Co., Carl C. Nicholas, Daniel W. Davis, doing business under the name and style of Davis & Company, Samuel F. Adamson and Claude E. Adamson, composing the firm of S. F. Adamson & Son, Absolom Shaffer and William Collier, composing the firm of Shaffer & Collier, in the penal sum of Fifteen Thousand Dollars ($15,000.00), for the payment of which well and truly to be made and done said Vandalia Railroad Company, as such Principal, and said The Guarantee Company of North America, as such Surety, bind themselves, their respective successors and assigns, jointly and severally, firmly by these presents.

In witness whereof, said Vandalia Railroad Company, as such Principal, and said The Guarantee Company of North America, as such Surety, have caused these presents to be duly executed by their proper officers respectively, thereunto lawfully authorized, and their respective corporate seals to be hereunto affixed, this 29th day of December, A. D. 1916.

The Condition of the above and foregoing obligation is such, that whereas, heretofore, towit: on the Twenty-third (23rd) day of December, A. D. 1916, the Superior Court of Marion County, in the County of Marion, State of Indiana, in the cause therein then pending entitled, "Gustav A. Schnull, William J. Griffin, George G.

Griffin, composing the firm of Schnull & Co., Lawrence A.
68 Busby, Charles F. Zies, William Ralph Elliott, Arthur W. Jones, Simon F. Gonter, and Joseph S. Gonter, composing the firm of S. F. Gonter & Co., Carl C. Nicholas, Daniel W. Davis, doing business under the name and style of Davis & Company, Samuel F. Adamson and Claude E. Adamson, composing the firm of S. F. Adamson & Son, Absolom Shaffer and William Collier, composing the firm of Shaffer & Collier, plaintiffs, vs. Vandalia Railroad Company, defendant, "being cause numbered 100,535 on the docket of said Court, made and entered a final decree and injunction enjoining said Vandalia Railroad Company from charging, collecting or receiving from the said plaintiffs in said cause or any other person or persons standing in the like situation as do the plaintiffs in said cause, for the handling and transportation of freights in the various classes of classified freights set out in the order of the Railroad Commission of Indiana made and entered by said Railroad Commission on the Fourteenth (14th) day of December, A. D. 1906, to become effective on the First (1st) day of February, 1907, rates in excess of the rates fixed and set down in said order; and

Whereas, said Superior Court of Marion County on the same day, towit, the Twenty-third (23rd) day of December, A. D. 1916, in the said cause aforesaid then pending in said Court, as aforesaid, made and entered an order suspending the operation of said decree and injunction for a period of thirty (30) days from and after
69 the date of the entry of said order, towit, the Twenty-third (23rd) day of December, A. D. 1916, on condition that said Vandalia Railroad Company within ten (10) days from and after said last named date, file in said Superior Court of Marion County its bond in the penal sum of Fifteen Thousand Dollars ($15,000.00) with The Guarantee Company of North America as surety thereon, which sum and surety were, in said order, approved by said Court, conditioned as in and by said order provided and required;

Now, therefore, if said Vandalia Railroad Company during the said thirty (30) day period of the suspension of said decree and injunction as aforesaid, shall keep a full, true and complete record and account of all moneys received by said Company for the transportation and carriage by it of the classes of freight specified in the said order of the Railroad Commission of Indiana dated December 14, 1906, and mentioned and described in said decree and injunction aforesaid, which record and account shall show the point of origin and the point of delivery of each shipment of such freight, the name of the consignor, and the name of the consignee, the total amount of money collected and received by said Company as compensation to it for transporting and carrying each of such shipments of freight, and the amount of money so collected and received by said Company in excess of the amount that would have been yielded to said
70 Company had it transported and carried such classes of freight at and for the rates therefor fixed in and by said order of said Railroad Commission of Indiana dated December 14, 1906, and in and by the said decree and injunction aforesaid; and if the said Vandalia Railroad Company shall within thirty (30) days from and after the expiration of the said period of suspension of the said

decree and injunction aforesaid, file with the Clerk of the Superior Court of Marion County at the City of Indianapolis, in the State of Indiana, a full, true and correct report of such record and account; and if in the event it shall be held upon the final determination of the said cause aforesaid, in which said final decree and injunction was entered as aforesaid in the court of last resort, that the said order of said Railroad Commission of Indiana dated December 14, 1906, is legal and valid, or the rates therein and in the said decree and injunction aforesaid specified, are legal and valid, said Vandalia Railroad Company shall within thirty (30) days from and after the date of such final determination of said cause pay to the Clerk of said Superior Court of Marion County for distribution upon the order of said Court among the persons lawfully entitled to receive the same, such sum of money as shall be equal to the amount said Vandalia Railroad Company shall have collected and received for the transportation and carriage of said classes of freight
71 aforesaid, during the said period of suspension of the said decree and injunction aforesaid in excess of the amount said Vandalia Railroad Company would have received during said period had said Company transported and carried such classes of freight at and for the rates therefor fixed in and by said order of said Railroad Commission of Indiana dated December 14, 1906, and in and by the said decree and injunction aforesaid; and if said Vandalia Railroad Company shall pay to the said Gustav A. Schnull, William J. Griffin, George G. Griffin, composing the firm of Schnull & Co., Lawrence A. Busby, Charles F. Zies, William Ralph Elliott, Arthur W. Jones, Simon F. Gonter, and Joseph S. Gonter, composing the firm of S. F. Gonter & Co., Carl G. Nicholas, Daniel W. Davis, doing business under the name and style of Davis & Company, Samuel F. Adamson and Clark E. Adamson, composing the firm of S. F. Adamson & Son, Absolom Shaffer and William Collier, composing the firm of Shaffer & Collier, such further legal damages, if any, which they may be lawfully entitled to recover, sustained by them by reason of the suspension of said decree and injunction and of said Vandalia Railroad Company continuing during such period the acts enjoined by said decree, then the above and foregoing obligation shall become and be null and void; otherwise it shall be and remain in full force and effect.

[SEAL.] VANDALIA RAILROAD COMPANY,
72 By J. J. TURNER,
President.

[SEAL.] THE GUARANTEE CO. OF NORTH AMERICA,
SOLON J. CARTER,
Attorney-in-fact.
BURRELL WRIGHT,
Attorney-in-fact.

Attest:
J. H. CHURCH,
Secretary.

Filed Jan. 15, 1917.
J. FRED. FRANCE,
Clerk.

Examined and approved this 30th day of December, A. D. 1916.

LINN D. HAY,
Judge of the Superior Court of Marion County.

Legal Form approved:
D. P. WILLIAMS,
General Solicitor.

Appeal Bond Filed.

"And now defendant Vandalia Railroad Comany, also files appeal bond herein, in the penal sum of One Thousand Dollars ($1,000.00) duly executed by the defendant, Vandalia Railroad Company, as principal, and The Guarantee Company of North America as surety thereon, in accordance with the order of the Court granting an appeal to the Supreme Court of Indiana, entered herein on the 23rd day of December, 1916, which bond is approved by the Court and it is in the words and figures following, towit:

73 STATE OF INDIANA,
County of Marion, ss:

In the Superior Court of Marion County, December Term, 1916,
Room No. 2.

No. 100,535.

GUSTAV A. SCHNULL and Others, Plaintiffs,
vs.
VANDALIA RAILROAD COMPANY, Defendant.

Appeal Bond.

Know all men by these presents: That Vandalia Railroad Company, as Principal, and The Guarantee Company of North America, as Surety, are held and firmly bound unto Gustav A. Schnull, William J. Griffin, George G. Griffin, composing the firm of Schnull & Co., Lawrence A. Busby, Charles F. Zies, William Ralph Elliott, Arthur W. Jones, Simon F. Gonter, and Joseph S. Gonter, composing the firm of S. F. Gonter & Co., Carl C. Nicholas, Daniel W. Davis, doing business under the name and style of Davis & Company, Samuel F. Adamson and Claude E. Adamson, composing the firm of S. F. Adamson & Son, Absolom Shaffer and William Collier, composing the firm of Shaffer & Collier, in the penal sum of One Thousand Dollars ($1,000.00) for the payment of which well and truly to be made and done, said Vandalia Railroad Company as such Principal, and said The Guarantee Company of North Amer-
74 ica, as such Surety, bind themselves, their respective successors and assigns, jointly and severally, firmly by these presents.

In witness whereof, said Vandalia Railroad Company as such Principal, and said The Guarantee Company of North America, as such Surety, have caused these presents to be executed by their proper officers respectively, thereunto lawfully authorized, and their respective corporate seals to be hereunto affixed this 29th day of December, A. D. 1916.

The Condition of the above and foregoing obligation is such that whereas, heretofore, towit, on the Twenty third (23rd) day of December, A. D. 1916, the said Gustav A. Schnull, William J. Griffin, George G. Griffin, composing the firm of Schnull & Co., Lawrence A. Busby, Charles F. Zies, William Ralph Elliott, Arthur W. Jones, Simon F. Gonter, and Joseph S. Gonter, composing the firm of S. F. Gonter & Co., Carl C. Nicholas, Daniel W. Davis, doing business under the name and style of Davis & Company, Samuel F. Adamson and Claude E. Adamson, composing the firm of S. F. Adamson & Son, Absolom Shaffer and William Collier, composing the firm of Shaffer & Collier, in the Superior Court of Marion County, were by said Superior Court of Marion County granted a final decree and injunction enjoining said Vandalia Railroad Company from charging, collecting or receiving from the said Gustav A. Schnull, William J. Griffin, George G. Griffin, composing the firm of
75 Schnull & Co., Lawrence A. Busby, Charles F. Zies, William Ralph Elliott, Arthur W. Jones, Simon F. Gonter, and Joseph S. Gonter, composing the firm of S. F. Gonter & Co., Carl C. Nicholas, Daniel W. Davis, doing business under the name and style of Davis & Company, Samuel F. Adamson and Claude E. Adamson, composing the firm of S. F. Adamson & Son, Absolom Shaffer and William Collier, composing the firm of Shaffer & Collier, or any other person or persons standing in the like situation as they stand, for the handling and transportation of freights in the various classes of classified freight set out in the order of the Railroad Commission of Indiana made and entered on the 14th day of December, 1906, to become effective on the First (1st) day of February, 1907, rates in excess of the rates for the handling and transportation of said classes of classified freight fixed and set down in such order of said Railroad Commission of Indiana, together with costs of suit, from which final decree and injunction entered by said Superior Court of Marion County said Vandalia Railroad Company has taken an appeal to the Supreme Court of Indiana:

Now, therefore, if said Vandalia Railroad Company shall and will duly prosecute said appeal and abide by the judgment and pay the costs which may be rendered against it, then the above and foregoing obligation shall be null and void; otherwise to be and remain in full force and effect.

76 [SEAL.] VANDALIA RAILROAD COMPANY,
By J. J. TURNER.
President.

Attest:
J. H. CHURCH,
Secretary.

THE GUARANTEE CO. OF NORTH AMERICA,
SOLON J. CARTER,
Attorney-in-fact.
BURRELL WRIGHT,
Attorney-in-fact.

Examined and approved this 30th day of December, A. D. 1916.
LINN D. HAY,
Judge of the Superior Court of Marion County.

Legal form approved.
D. P. WILLIAMS,
General Solicitor.

Bill of Exceptions Filed.

And afterwards towit on the 9th day of January, 1917, being the 8th judicial day of the January Term, 1917, of said court before the same honorable judge thereof, the following proceedings were had herein, viz:

"Comes now the defendant, Vandalia Railroad Company, by its counsel, and files its bill of exceptions containing the typewritten transcript of the evidence and the proceedings on the trial of the cause, which has heretofore been presented to and signed by the Judge of this Court. And it is ordered that the Clerk certify the same with the transcript on appeal as a part of the record of the cause, without copying, and said bill of exceptions is as follows:

77 STATE OF INDIANA,
County of Marion, ss:

Superior Court of Marion County, Room Two, December Term, 1916.

Before the Hon. Linn D. Hay, Judge.

No. 100,535.

GUSTAV A. SCHNULL et al.

vs.

THE VANDALIA RAILROAD CO.

Appearances:

Messrs. Smith, Remster, Hornbrook & Smith, Attorneys for Plaintiffs;
Messrs. Pickens, Moores, Davidson & Pickens & D. P. Williams, Attorneys for Defendant.

Filed Jan. 9, 1917.
THEODORE STEIN, Jr.,
Clerk.

Transcript made by Dove Casady Meredith, Official Reporter, Room 2.

Defendant's Bill of Exception.

78 *Index.*

Plaintiffs' Evidence:			Page
Exhibit No.	1,	Stipulation	6
" "	2,	Pages 1-17 Transcript Wood et al. vs. Vandalia R. R. Co.	11
" "	3,	Original petition of Schnull & Co. before R. R. Commission	48
" "	4,	Amended Petition	51
" "	5,	Stipulation on pp. 198 & 199 of Transcript	62
" "	6,	Page 9 of Transcript	63
" "	7,	Certified copy of summons	65
" "	8,	Certified copy of letter of M. C. Downing	70
" "	9,	Certified copy of decree of Supreme Court of U. S.	72
" "	10,	Certified copy of official motion in U. S. Cir. Court	80
" "	11,	Pages 41-42 of Transcript	83
" "	12,	Pages 43-49 " "	87
" "	12a,	" 77-79 " "	104
" "	13,	Tabulation of shipments	112

Witnesses:

	Direct	Cross
Hewitt H. Lingle	108	
William J. Griffin	114	
George G. Griffin	120	
Stipulation	Page 124	

Defendant's Evidence:
Exhibit No. 14, Petition of Vandalia R. R. Co. before Public Service Com. 127
" " 15, Order of Public Service Com. 131
Plaintiffs' Rebuttal Evidence:
Exhibit No. 16, Letter to John G. Williams. 132
(Exhibit not admitted)

Filed Jan. 9, 1917.
THEODORE STEIN,
Clerk.

79 STATE OF INDIANA,
County of Marion:

In the Marion Superior Court, Room 2, December Term, 1916.

No. 100,535.

GUSTAV A. SCHNULL et al.

vs.

VANDALIA RAILROAD COMPANY.

Bill of Exceptions.

Be it remembered, That on the 4th day of December, 1916, the same being the 1st juridical day of the December Term, 1916, of the Superior Court of Marion County, State of Indiana, the following proceedings were had in the above entitled cause, before the Honorable Linn D. Hay, Judge of said Court, to-wit:

The cause being at issue, the same came on for trial before the Court without the intervention of a jury, Messrs. Smith, Remster, Hornbrook & Smith appearing as counsel for the plaintiffs, and Messrs. D. P. Williams, and Pickens, Moores, Davidson & Pickens appearing as counsel for the defendant.

And be it further remembered, That before the trial was
80 begun, for the purpose of facilitating and expediting the trial of said cause, said Judge required to be present Dove Casady Meredith, Official Reporter of said Court, to take down in shorthand the oral evidence, including both questions and answers, and note all rulings of the Judge in respect to the admission and rejection of

evidence, and the exceptions taken thereto, and the documentary evidence offered and introduced on the trial of said cause, the said Dove Casady Meredith having been, at the time of her appointment, duly sworn to faithfully perform her duties as such Official Shorthand Reporter, which said appointment and her official oath, as such reporter, are of and among the records of said Court.

And be it further remembered, That said Official Reporter was present and took down in shorthand the oral and documentary evidence given and offered upon the trial of said cause, including both questions and answers, and noted all of the objections made to the admission of evidence, all of the rulings of the court with respect to the admission and rejection of evidence, and the exceptions taken thereto.

81 And the defendant having requested said Official Reporter to furnish it with a complete transcript of said evidence, objections, rulings of the court thereon, and the exceptions taken thereto, including all documentary evidence, a Typewritten Transcript of the same was made by said Official Reporter, which typewritten transcript is in the words and figures following, that is to say:

The plaintiffs to maintain the issues on their behalf, offered and introduced the following evidence, to-wit:

82 Mr. Smith: The first thing I want to offer in evidence, may the Court please, is a stipulation between the parties in regard to the admission of certain instruments in evidence.

Mr. Pickens: That is the stipulation that we signed.

Mr. Smith: Yes.

The said stipulation, so offered and marked Exhibit No. 1, was admitted and read in evidence, the same being in the words and figures following, towit:

EXHIBIT No. 1.

12/4/'16.

STATE OF INDIANA,
County of Marion, ss:

Superior Court No. 2.

No. 100,535.

GUSTAV A. SCHNULL et al.
vs.
THE VANDALIA RAILROAD CO.

Stipulation as to Evidence.

83 It is hereby agreed by and between the parties hereto, that upon the trial of the above entitled cause;

1st. That either of the parties to this cause may read in evidence, from The Printed Transcript of the Record in the Supreme Court

of the United States, in the cause of William J. Wood, John V. McClure, Frank E. Payne, et al., Appellants, vs. Vandalia Railroad Company, such portions thereof as they may elect, so far as they are pertinent or material to the issues joined in this cause, with the same force and effect as if original, or a certified copy thereof, was produced and offered in evidence. Each party reserving the right to make objection as to the materiality and pertinence of the evidence thus offered, and to reserve proper exceptions to the ruling thereon.

2nd. A copy of the final order and decree of the Supreme Court of the United States in said cause as certified to the District Court of the United States for the District of Indiana, by the Clerk of the Supreme Court of the United States—together with the final entry of said United States District Court, disposing of said cause, with the like right of opposing counsel to make objection to the materiality, pertinence or relevancy of such evidence under the issues joined in the cause and to reserve the like exception.

84 3rd. Copies, now in the possession of Counsel for Defendant without certification of the following papers.

1st. Petition filed on the 12th day of November, 1913, by the Vandalia Railroad Company before the Public Service Commission of Indiana in the matter of Schnull and Company for a rehearing in said matter and for the suspension of the order theretofore entered in said matter by said Railroad Commission.

2nd. The order entered on said petition under date of November 18th, 1913.

3rd. Copy of letter of J. F. McClure to Mr. John G. Williams, General Counsel, Vandalia R. R. Co. bearing date of November 18th, 1913.

It being the intention of the parties in entering into this stipulation, that the production of the original papers named is waived, and that the copies named shall be admitted as evidence, with the same force and effect as if the originals had been produced, but reserving to each party the right to object to the materiality, pertinence or advisiability of the originals had they been produced, under the issues joined in this cause, and to reserve any proper exceptions to the rulings made by the Court.

85 (Signed) PICKENS, MOORES, DAVIDSON & PICKENS,
Attorneys for Defendant.
SMITH, REMSTER, BORK-BROOK & SMITH,
Attorneys for Plaintiffs.

Indianapolis, Indiana, November 18, 1916."

Mr. Smith: I now offer in evidence, may the Court please, the Transcript of the case of William J. Wood, et al., vs. Vandalia Rail-

road Company, in the Supreme Court of the United States, pages one to seventeen. Now, I do not need to read this at length?

Mr. Pickens: No.

Mr. Smith: They are all considered in evidence, then?

The Court: You had better have them marked as Exhibits then.

Mr. Smith: I will when I am ready to introduce them, your honor.

86 Mr. Pickens: This stipulation which has been introduced and marked Exhibit No. 1 applies to either party; either party may take exception to the introduction of any documentary evidence which is referred to in that stipulation?

Mr. Smith: Not quite that. I now offer, your Honor, the certified copy of the plaintiff's complaint in Judge Anderson's Court.

Mr. Pickens: May the Court please, the defendant objects to the introduction of this document on the ground that it would be wholly immaterial and irrelevant and not pertaining to the issues in this case; and it does not tend to prove the plaintiff's cause of action for the reason that it is a suit simply to enjoin the Railroad Company, the defendant, from charging any rates other than the rates specified in the order of the Railroad Commission mentioned in the complaint, and that the document offered and that may be offered in connection with that suit can have no effect on the issues presented by this complaint.

The Court: I will overrule the objection; Exception.

87 Mr. Williams: I wish to add one more ground to that objection, may the Court please.

The defendant objects for the further reason that the parties to the suit mentioned in the certified copy of the Bill of Complaint now offered in evidence are not the same as the parties in this suit, and that the issues resented by such certified copy of that Bill of Complaint are not the same as the issues presented in this cause, and that any judgment or any decree entered on such Bill of Complaint does not in any way adjudicate any of the issues in this suit.

The Court: I will overrule the objection.

To which ruling of the Court the defendant, by counsel, at the time excepted.

Pages one to seventeen of said Transcript, so offered and marked Exhibit No. 2, were admitted and read in evidence, the same being in the words and figures following, to wit:

88 EXHIBIT No. 2.

12/4/1916.

"Chancery.

United States of America to the Vandalia Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington,

D. C., thirty days after the date hereof, pursuant to an appeal which has been allowed by the Circuit Court of the United States for the District of Indiana, from its final decree in a suit wherein William J. Wood, John F. McClure, Frank E. Payne, Gustav A. Schnull, William J. Griffin and George G. Griffin are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Albert B. Anderson, Judge of the District Court of the United States for the District of Indiana, and ex-officio Judge of said Circuit Court, this 20th day of May in the year of our Lord, one thousand nine hundred and ten.

ALBERT B. ANDERSON,
Judge.

89 Service acknowledged this 8th day of June 1910.

VANDALIA RAILROAD COMPANY.
By JNO. G. WILLIAMS,
Gen'l Counsel.

Pleas of the Circuit Court of the United States for the District of Indiana, Begun and Holden at the United States Court House in the City of Indianapolis, in said District, on the First Tuesday in May, in the Year of Our Lord One Thousand Nine Hundred and Nine, Before the Honorable Albert B. Anderson, Judge of the District Court of the United States for the District of Indiana and ex-Official Judge of said Circuit Court.

No. 10663.

Chancery.

VANDALIA RAILROAD COMPANY

vs.

UNION B. HUNT, WILLIAM J. WOOD, CHARLES V. McADAMS; JAMES Bingham, Elliot R. Hooten, Gustav A. Schnull, William J. Griffin, George G. Griffin.

Be it remembered, that heretofore, to-wit, at the November Term of said Court, on the 22nd day of January, 1907, before the Honorable Albert B. Anderson, Judge of said Court, the following proceedings in the above entitled cause were had, to-wit:

90 Comes now the Complainant by John G. Williams, S. O. Pickens and D. P. Williams, its solicitors, and files its bill of complaint herein, in the words following, to-wit:

To the Judges of the Circuit Court of the United States for the District of Indiana:

Vandalia Railroad Company, a consolidated corporation under the laws of the States of Indiana and Illinois and a citizen of the State

of Indiana, with its principal office and place of business at the City of Terre Haute, in said State of Indiana, brings this its bill against Union B. Hunt, William J. Wood, Charles V. McAdams, James Bingham, Elliot R. Hooten, Gustav A. Schnull, William J. Griffin, and George G. Griffin, of the City of Indianapolis, in the State of Indiana, and each a citizen and resident of the State of Indiana. And thereupon your orator complains and says:

For more than two years last past your orator has been, and is now the owner, in possession of and operating a line of railroad extending from the City of Indianapolis, Marion County, Indiana, through the counties of Marion, Hendricks, Putnam, Clay and Vigo in the State of Indiana, and the Cities of Greencastle, Brazil and Terre Haute in the State of Indiana to the line dividing the States of Indiana and Illinois.

Defendants Union B. Hunt, William J. Wood, Charles V.
91 McAdams are now, and for nearly two years last past have been, members of the Railroad Commission of Indiana, duly appointed by the Governor of the State of Indiana, and duly qualified and acting as such members of said Railroad Commission of Indiana.

Defendant James Bingham is the duly elected, qualified and acting Attorney General of the State of Indiana, and defendant Elliot R. Hooten is the duly elected, qualified and acting Prosecuting Attorney in and for the County of Marion, State of Indiana.

Defendants Gustav A. Schnull, William J. Griffin, and George G. Griffin are the parties, who under the firm name of Schnull & Company, instituted the proceedings hereinafter mentioned before the Railroad Commission of Indiana, seeking a reduction in the rates charged by your orator for handling classified freight.

On the 14th day of December, 1906 your orator was, and for more than two years prior to that date had been, engaged as a common carrier in the business, among other things, of transporting freight between said city of Indianapolis and the line dividing the States of Indiana and Illinois, and for the purpose of establishing its rates of charges for transporting and handling such freight your
92 orator had divided the same into six classes, numbered respectively first, second, third, fourth, fifth and sixth, and had fixed and was charging for the handling and transportation of such freight the following charges:

Between Indianapolis and the Following Stations:

Rates in Cents Per Hundred Pounds.

	Classes.					
	1	2	3	4	5	6
Ben Davis	10	9	8	7	5	4
Bridgeport	12	11	10	8	6	5
Gibson	15	13	11	9	6.5	5.5
Clayton	18	15	12	10	7	6
Coatsville	20	18	14.5	11	8	7
Limedale	22	20	17	12	9	8
Brazil	24.5	22	19.5	12.5	9	8
Nelson	25	22	19.5	12.5	9.5	8

In August, 1905 the defendants, Gustav A. Schnull, William J. Griffin and George G. Griffin under the name and style of Schnull & Company institu-ed proceedings before the Railroad Commission of Indiana to procure a reduction of the rates established by your orator as hereinbefore set forth, claiming that said rates were in excess of what would be a reasonable compensation to your orator for the services rendered by it in handling and carrying the classified freight to which said rates were applicable, and thereupon
93 under date of December 14, 1906, the Railroad Commission of Indiana made and entered the following order:

"STATE OF INDIANA:

Railroad Commission of Indiana.

No. 6.

SCHNULL & COMPANY

vs.

VANDALIA RAILROAD COMPANY.

"The Commission after being fully advised in the premises, now finds that the rates complained of in the petition and now in force on the respondent's railroad, are unreasonable and unjust in that they are excessive, and that to the extent that they are excessive they are charged and collected in violation of law, and the respondent so failing to have just and reasonable rates in force on such railway, the Commission does now further find from the evidence that just and reasonable rates for the transportation of classified freight over that part of the respondent's line west from Indianapolis, Indiana, to the Indiana-Illinois State line should not exceed the rates specified in the following order of the Commission:

"It is therefore, ordered by the Commission that the re-
94 spondent, The Vandalia Railroad Company, after February 1, 1907, shall not charge or collect, for the transportation of

traffic moving over its lines to all points from Indianapolis to the Indiana-Illinois State line, as now classified by it, under the Official Classification, rates in excess of the following schedule:

Rates in Cents per 100 Pounds.

From Indianapolis to stations named.	Miles.	Classes. 1	2	3	4	5	6
Ben Davis	6	8	7	6.5	5	3.5	2.5
Bridgeport	9	8.5	7.5	7	5	4	3
Oakplain	11	8.5	7.5	7	5	4	3
Plainfield	14	9	8	7	5.5	4	3
Gibson	15	9	8	7	5.5	4	3
Cartersburg	17	9.5	8.5	7.5	5.5	4.5	3
Clayton	20	9.5	8.5	7.5	5.5	4.5	3
Pecksburg	23	10.5	9.5	8.5	6.5	4.5	3.5
Amo	25	10.5	9.5	8.5	6.5	4.5	3.5
Coatsville	28	11	10	9	6.5	5	3.5
Fillmore	33	11.5	10.5	9	7	5	4
Alemeda	36	12	11	9.5	7	5.5	4
Greencastle	39	12	11	9.5	7	5.5	4
Limedale	40	12	11	9.5	7	5.5	4
Hamrick	44	13	12	10.5	8	6	4.5
Reelsville	47	13.5	12	11	8	6	4.5
Eagles	50	13.5	12	11	8	6	4.5
Harmony	54	14	12.5	11	8.5	6.5	4.5
Knightsville	55	14	12.5	11	8.5	6.5	4.5
Brazil	57	14.5	13	11.5	8.5	6.5	5
Turner	59	14.5	13	11.5	8.5	6.5	5
Staunton	61	14.5	13	11.5	8.5	6.5	5
Cloverland	62	15.5	14	12.5	9.5	7	5
Seeleyville	65	15.5	14	12.5	9.5	7	5
Prairie	71	16	14.5	13	9.5	7	5.5
Terre Haute	73	16.5	15	13	10	7.5	5.5
Macksville	75	16.5	15	13	10	7.5	5.5
Liggett	77	17	15.5	13.5	10	7.5	5.5
Nelson	79	17	15.5	13.5	10	7.5	5.5

95

"A duly certified copy of this order is directed to be served upon W. C. Downing, Superintendent of the respondent, by delivery.

"STATE OF INDIANA:

I, Charles B. Riley, Secretary of the Railroad Commission of Indiana, hereby certify that the above and foregoing is a full, true and complete copy of the schedule of rates adopted by said Commission, on December 14, 1906, in the foregoing entitled proceeding.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission, at Indianapolis, Indiana, this 14th day of December, A. D. 1906.

[SEAL.] CHAS. B. RILEY,
Secretary."

96 Your orator says that the rates fixed by it as hereinbefore set forth were entirely reasonable and that in handling the traffic covered thereby your orator received only sufficient compensation to cover the actual cost to it of handling and carrying such traffic, and that if your orator be required to comply with the order aforesaid of the Railroad Commission of Indiana and collect only the rates specified in said order, your orator will not obtain revenue sufficient to reimburse it for its actual outlay in handling and carrying the traffic covered by said order of the Railroad Commission of Indiana.

Your orator says that the defendants composing the firm of Schnull & Company are wholesale grocers in the City of Indianapolis, and in connection with their business make, and are desirous of making daily shipments of freight over the line of your orator's railroad between Indianapolis and the Illinois State line, and that all of such shipments will be affected by the order of the Railroad Commission of Indiana hereinbefore set forth.

Your orator is informed and believes, and so states the fact to be, that there are a number of other business establishments in the City of Indianapolis that will seek to avail themselves of the rates
97 fixed by said order of the Railroad Commission of Indiana, and that a refusal on the part of your orator to comply with said order will involve it in a number of actions at law brought by said Schnull & Company and other shippers to recover the damages allowed by the statute of the State of Indiana providing for the organization of said Railroad Commission of the State of Indiana, and also to recover the penalty prescribed by that law and payable to the State of Indiana for a failure to comply with an order of said Commission establishing maximum rates.

And by reason of the premises your orator says that it will be subject to a multiplicity of suits and be threatened with the assessment of the numerous and large penalties prescribed by law for a failure to comply with an order of the Railroad Commission of Indiana, unless the defendants herein be enjoined from enforcing or claiming the right to enforce the rates established by the order of the Railroad Commission of Indiana hereinbefore set forth.

Your orator says that under section One (1), Article Fourteen (14) of the Constitution of the United States it cannot be lawfully deprived of its property without due process of law, nor be denied the equal protection of the laws; and your orator says that if
98 the rates fixed by the order of the Railroad Commission of Indiana hereinbefore set forth be enforced, it will be compelled to carry the traffic covered by that order at less than the actual cost of such carriage, and will as a result, be deprived of its property without due process of law.

And your orator says that unless the defendants herein, and each of them, and their successors in office and representatives in like condition be restrained and enjoined, your orator will be subjected to the numerous suits and to the assessment of the numerous penalties allowed and prescribed by an act of the General Assembly of the State of Indiana entitled, "An Act providing for the creation of a railroad commission, the appointment and compensation of the members thereof, prescribing the powers and duties of such commission and its members, prescribing certain duties and obligations of railroad companies, express companies and other common carriers, defining certain misdemeanors and prescribing penalties; providing for the collection of penalties by civil action from railroad companies and other common carriers by the State in cases therein provided for; appropriating money to carry out its provisions; providing for a review of the decisions of the commission and conferring jurisdiction
99 on certain courts to hear and determine such proceedings, and repealing all laws and parts of laws in conflict therewith. Approved February 28, 1905."

Your orator says that each and all of the acts and doings of the defendants herein, their successors in office and representatives in like condition in the way of enforcing and collecting the damages and penalties allowed and prescribed by the Act of the General Assembly of the State of Indiana hereinbefore mentioned will tend to the manifest wrong, irreparable injury and oppression of your orator.

To the end, therefore, that your orator may have that relief which it can only obtain in a court — equity, and that the defendants herein may answer the premises, but not upon oath or affirmation,—answer upon oath or affirmation being hereby expressly waived, your orator prays:

1. That the order of the Railroad Commission of Indiana made and entered under date of December 14, 1906, and hereinbefore set forth, be declared void and of no force or effect.

2. That each and all the defendants herein, their successors in office and their representatives in like condition be, pending this action, enjoined, restrained and prohibited from instituting or
100 prosecuting any suit or suits against your orator for the recovery of any damages, overcharges, penalty or penalties under or by virtue of the said act of the General Assembly of the State of Indiana, or any of its provisions, or under and by virtue of the said order of the Railroad Commission of Indiana, made and entered under date of December 14, 1906, hereinbefore set forth.

3. That upon the final hearing of this cause it be decreed that said order of December 14, 1906, as hereinbefore set forth, be declared void and of no effect, and be cancelled; and that the defendants and each of them and their successors in office and representatives in like condition be perpetually enjoined and restrained from instituting or prosecuting any suit or suits against your orator for the recovery of any damages, overcharges, penalty or penalties under or by virtue of

said act of the General Assembly of the State of Indiana, or any of its provisions, or under and by virtue of the said order of December 14, 1906, as hereinbefore set forth, of the Railroad Commission of the State of Indiana.

4. And your orator prays for all such further or other relief as the nature of the case may require and to your Honors shall seem meet.

May it please your Honors to grant unto your orator a writ
101 of subpœna to be directed to said Union B. Hunt, William J. Wood, Charles V. McAdams, James Bingham, Elliot R. Hooton, Gustav A. Schnull, William J. Griffin and George G. Griffen, thereby commanding them, and each of them, at a certain time and under a certain penalty therein to be limited, to appear personally before this Honorable Court and then and there full, true, direct and perfect answers make to all and singular the premises, and to stand, perform and abide such order, direction and decree as may be made against them, or either of them in the premises.

VANDALIA RAILROAD COMPANY,
By JOSEPH WOOD,
President.

JNO. G. WILLIAMS,
S. O. PICKENS,
D. P. WILLIAMS,
Solicitors for Complainant.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Before me, a Notary Public in and for said County and State, this 21st day of January, A. D. 1907, personally appeared Joseph Wood, who having been first duly sworn, upon his oath deposes and says: That he is the president of the Vandalia Railroad Company, complainant in the above entitled cause; that he has read the fore-
102 going bill of complaint and knows the contents thereof, and that the same is true in substance and in fact.

JOSEPH WOOD.

Subscribed and sworn to before me the day and year last written above.

[SEAL.] S. H. CHURCH,
Notary Public.

My Commission expires March 20, 1909.

And afterwards, to-wit, at the November Term of said Court on the 4th day of March, 1907, before Honorable Albert E. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Come now the defendants by James Bingham, Esq., their solicitor, and file their answer herein, in the words following, to-wit:

To the Judges of the Circuit Court of the United States for the District of Indiana:

Defendants Union B. Hunt, William J. Wood, Charles V. McAdams, James Bingham, Elliot R. Hooton, Gustav A. Schnull, William J. Griffin and George G. Griffin, each for himself, for separate and several answer to the bill of complaint of the complainant, Vandalia Railroad Company, says, that he admits that complainant

103 is a corporation consolidated under the laws of the States of Indiana and Illinois, and a citizen of the State of Indiana, with its principal office and place of business at the city of Terre Haute, in the State of Indiana, and that for more than two years last past prior to the beginning of this action said complainant has been and still is the owner, in possession of and operating a line of railroad extending from the city of Indianapolis, Marion County, Indiana, through the counties of Marion, Hendricks, Putnam, Clay and Vigo, in the State of Indiana, and the cities of Greencastle, Brazil and Terre Haute in said State, to the line dividing the States of Indiana and Illinois;

That defendants, Union B. Hunt, William J. Wood and Charles V. McAdams were, at the beginning of this action, and for nearly two years last past prior thereto, the duly appointed, qualified and acting members of the railroad Commission of Indiana;

That defendant, James Bingham, is the duly elected, qualified and acting attorney general of the State of Indiana;

That defendant, Elliot R. Hooton, is the duly elected, qualified and acting prosecuting attorney in and for the County of Marion in the state of Indiana;

That defendants, Gustav A. Schnull, William J. Griffin

104 and George G. Griffin, are and were partners doing business under the firm name of Schnull and Company, and instituted the proceedings referred to in said bill of complaint before the Railroad Commission of Indiana, seeking a reduction in the rates of complainant Railroad Company for handling classified freight.

That on the 14th day of December, 1905, and for more than two years last prior thereto complainant has been engaged as a common carrier in the business, among other things, of transporting freight between said city of Indianapolis and said state line.

That for the purpose of establishing its rates and charges for transporting and handling freight, complainant has divided same into six classes, numbered respectfully first, second, third, fourth, fifth and sixth, and has fixed and was charging for handling and transporting freight, the following charges:

105 Between Indianapolis and the Following Stations:

Rates in Cents per Hundred Pounds.

	Classes.					
	1	2	3	4	5	6
Ben Davis	10	9	8	7	5	4
Bridgeport	12	11	10	8	6	5
Gibson	15	13	11	9	6.5	5.5
Clayton	18	15	12	10	7	6
Coatsville	20	18	14.5	11	8	7
Limedale	22	20	17	12	9	8
Brazil	24.5	22	19.5	12.5	9	8
Nelson	25	22	19.5	12.5	9.5	8

That in August, 1905, said defendants, Schnull, Griffin and Griffin, under the name and style of Schnull and Company, instituted proceedings before the Railroad Commission of Indiana to secure a reduction of the rates established and charged by the complainant as aforesaid, claiming therein that said rates were in excess of what would be a reasonable compensation to complainant for the services rendered in handling and carrying classified freight to which said rates were applicable, and that in said proceedings under the date of December 14, 1906, the Railroad Commission of Indiana made and entered the following order:

106 STATE OF INDIANA:

Railroad Commission of Indiana.

No. 6.

SCHNULL & COMPANY
vs.
VANDALIA RAILROAD COMPANY.

"The Commission after being fully advised in the premises, now finds that the rates complained of in the petition and in force on the respondent's railroad, are unreasonable and unjust in that they are excessive, and that to the extent that they are excessive they are charged and collected in violation of law, and the respondent so failing to have just and reasonable rates in force on such railway, the Commission does now further find from the evidence that just and reasonable rates for the transportation of classified freight over that part of the respondent's line west from Indianapolis, Indiana, to the Indiana-Illinois State line should not exceed the rates specified in the following order of the Commission;

"It is, therefore, ordered by the Commission that the respondent, The Vandalia Railroad Company, after February 1, 1907,
107 shall not charge or collect, for the transportation of traffic moving over its lines to all points from Indianapolis to the

Indiana-Illinois State line, as now classified by it, under the Official Clas-ification, rates in excess of the following schedule:

From Indianapolis to Stations Named.

Rates in Cents per 100 Pounds.

	Miles.	Classes. 1	2	3	4	5	6
Ben Davis.....	6	8	7	6.5	5	3.5	2.5
Bridgeport	9	8.5	7.5	7	5	4	3
Oakplain	11	8.5	7.5	7	5	4	3
Plainfield.....	14	9	8	7	5.5	4	3
Gilson	15	9	8	7	5.5	4	3
Cartersburg	17	9.5	8.5	7.5	5.5	4.5	3
Clayton	20	9.5	8.5	7.5	5.5	4.5	3
Pecksburg 23		10.5	9.5	8.5	6.5	4.5	3.5
Amo	25	10.5	9.5	8.5	6.5	4.5	3.5
Coatsville	28	11	10	9	6.5	5	3.5
Fillmore	33	11.5	10.5	9	7	5	4
Alemeda	36	12	11	9.5	7	5.5	4
Greencastle	39	12	11	9.5	7	5.5	4
Limedale	40	12	11	9.5	7	5.5	4
Hamrick	44	13	12	10.5	8	6	4.5
Reelsville	47	13.5	12	11	8	6	4.5
Eagle	50	13.5	12	11	8	6	4.5
Harmony.	54	14	12.5	11	8.5	6.5	4.5
108 Knightsville ...	55	14	12.5	11	8.5	6.5	4.5
Brazil	57	14.5	13	11.5	8.5	6.5	5
Turner	59	14.5	13	11.5	8.5	6.5	5
Staunton.	61	14.5	13	11.5	8.5	6.5	5
Cloverland	62	15.5	14	12.5	9.5	7	5
Seeleyville 65		15.5	14	12.5	9.5	7	5
Prairie	71	16	14.5	13	9.5	7	5.5
Terre Haute	73	16.5	15	13	10	7.5	5.5
Macksville	75	16.5	15	13	10	7.5	5.5
Leggett.	77	17	15.5	13.5	10	7.5	5.5
Nelson	79	17	15.5	13.5	10	7.5	5.5

A duly certified copy of this order is directed to be served upon W. C. Downing, Superintendent of the respondent, by delivery.

"STATE OF INDIANA:

I, Charles B. Riley, Secretary of the Railroad Commission of Indiana, hereby certify that the above and foregoing is a full, true and complete copy of the schedule of rates adopted by said Commission, on December 14, 1906, in the foregoing entitled proceeding.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission, at Indianapolis, Indiana, this 14th day of December, A. D. 1906.

[SEAL.]

CHAS. B. RILEY,
Secretary."

109 That said defendants composing said firm of Schnull and Company, were and are wholesale grocers of the city of Indianapolis, and were and are in connection with their said business desirous of making daily shipments of freight over complainant's line of railroad from Indianapolis to said State line, and that all of said shipments will be affected by the order of the Railroad Commission of Indiana aforesaid.

And he denies that the rates fixed and charged by the complainant as aforesaid, upon classified freight, were reasonable and that in handling the traffic covered thereby complainant only received sufficient compensation to cover the actual cost of handling and carrying such traffic, and denies that if complainant be required to comply with the orders aforesaid of said Railroad Commission of Indiana, and collect only the rates specified in said order, that complainant will not obtain revenue sufficient to reimburse it for actual outlay in handling and carrying the traffic covered by said order of said Railroad Commission; and denies that if the rates fixed by the order of said Railroad Commission aforesaid be enforced, that complainant will be compelled to carry the traffic covered by said orders at less than the actual cost of such carriage, and will as a result be de-

110 prived of its property without due process of law.

That as to the information and belief of the complainant, and the facts with reference thereto, which complainant states are true, there are a number of other business establishments in the City of Indianapolis that will seek to avail themselves of the rates fixed by rail order of said Railroad Commission of Indiana, and that a refusal on the part of complainant to comply with said order will involve it in a number of actions at law, brought by said other shippers to recover damages, etc.

He says he is not advised, and neither affirms or denies same, and asks that strict proof thereof be made by complainant.

He further says that in said proceedings before said Railroad Commission which established said rates found to be reasonable by it as aforesaid, said complainant participated, and that said act and said law under which said proceedings were instituted referred to in said bill of complaint, makes provision for an appeal from said order to the appellant court of the State of Indiana, and the filing of bond which will amply and fully protect said complainant from all or any threatened suit or prosecutions referred to in complainant's bill of complaint, and thereby relieve and protect said complainant

111 from all liability of every kind and character on account of suits or otherwise.

That as to all other matters alleged in said bill of complaint and not specifically affirmed or denied in this answer he requires strict proof of complainant.

Said defendants, each for himself, further answering denies that the complainant is entitled to the relief, or any part thereof, in said bill of complaint demanded, and prays the same advantage of this answer as if he had pleaded or demurred to the said bill of complaint, and prays to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

UNION B. HUNT.
CHARLES V. McADAMS.
WILLIAM J. WOOD.
JAMES BINGHAM.
GUSTAV A. SCHNULL.
WILLIAM J. GRIFFIN.
GEORGE G. GRIFFIN.

JAMES BINGHAM,
Attorney and Solicitor for Defendants.

And afterwards, to-wit, at the November Term of said court, on the 3rd day of May, 1907, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the
112 above entitled cause were had, to-wit:

Come the parties by their solicitors and by leave of Court now granted complainant amends its bill by inserting after the words "to the manifest wrong, irreparable injury and oppression of your orator" appearing at the close of the second paragraph on page seven of said bill of complaint the following:

"And your orator avers that the loss which it would sustain in handling the traffic aforesaid at the rates named in the order of said Commission would be greatly in excess of two thousand dollars ($2,000.00), exclusive of interest and costs, and that the damages and penalties to which it would be subjected for failure to comply with said order would also be greatly in excess of the sum of two thousand dollars ($2,000.00), exclusive of interest and costs."

VANDALIA RAILROAD COMPANY,
By S. O. PICKENS,
JNO. G. WILLIAMS,
Its Solicitors.

And complainant's motion for a temporary injunction now coming on to be heard and the Court being fully advised, it is ordered that said motion be overruled and a temporary injunction denied.

113 And afterwards, to-wit, at the November Term of said Court, on the 4th day of May, 1907, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the complainant by John G. Williams, S. O. Pickens and D. P. Wiliams, its solicitors, and files its replication herein in the words following, to-wit:

The Replication of the Vandalia Railroad Company, Plaintiff, to the Answer of the Defendant.

This repliant, saving and reserving unto itself all, and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto says, that it will aver and prove its said bill to be true, certain and sufficient in the laws to be answered unto; and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that, any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove, as this Honorable Court shall direct, and humbly
111 prays, as in and by its said bill it hath already prayed.

VANDALIA RAILROAD COMPANY,
By S. O. PICKENS,
JNO. G. WILLIAMS,
Its Solicitors.

And afterwards, to-wit, at the May Term of said Court, on the 8th day of October, 1907, before the Honorable Albert R. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

It appearing to the Court that the standing Master in Chancery is disqualified and declines to act in such capacity in the above entitled cause on account of his connection with parties interested in the result of the suit as their solicitor, it is ordered that the order of reference to him be and the same is hereby vacated and set aside.

And the complainant comes now by John G. Williams, its solicitor, and moves the Court for another order of reference, and it is thereupon ordered that the above entitled cause be and the same is hereby referred to Noble C. Butler who is now for special reasons appointed a special master in chancery herein and he is hereby directed to take the testimony concerning the matters in controversy, and
115 report the same to the Court with his finding of facts and conclusions of law with all convenient speed.

And afterwards, to-wit, at the November Term of said Court, on the 6th day of March, 1909, before the Honorable Albert R. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now Noble C. Butler, Esq., Special Master herein and files his report and evidence in the above entitled cause, which report is in the words following, to-wit:

Report of Special Master in Chancery.

To the Honorable the Judges of said Court:

I, the undersigned, Special Master in Chancery, to whom the above entitled cause has been referred, herewith report the testimony and exhibits and other evidence taken by me under the order of reference, and my finding of facts and conclusions of law as required by said order.

In the discharge of my duty as Special Master I was attended by the solicitors for the parties as reported in the accompanying volume of evidence.

The bill of complaint in this case charges that the Railroad Commission of Indiana on December 14, 1906, made and entered an order which in substance and effect prohibits the complainant from charging or collecting rates for the transportation of classified freight from and between Indianapolis and the Illinois state line, and
116 all intermediate points upon its road in excess of the rates that are designated in the order. The language of the order is "the transpor-ation of traffic," and all points from Indianapolis to the Indiana-Illinois State Line," but the construction which I have given it is apparently accepted by all parties, and the case has been heard upon that construction of the order.

It is further charged in the bill that if the order of the Railroad Commission be enforced the complainant "will not obtain revenue sufficient to reimburse it for its actual outlay in handling and carrying the traffic covered by said order," and that an enforcement of said order will therefore deprive the complainant of its property without due process of law; wherefore the complainant prays that said order may be declared void and cancelled, and that the defendants and each of them, and their successors in office may be perpetually enjoined from any proceedings under it.

An answer and a replication have been filed, and the sole question presented for consideration by the pleadings is whether an enforced adoption of the rates prescribed by the order of the Railroad Commission would have the result alleged by the complainant.

The Supreme Court has indicated the rules and principles
117 which should be observed in determining this question. It held in Railroad Co. v. Minnesota, 186 U. S. 257, 264 that "the presumption is that the rates fixed by the commission are reasonable and the burden of proof is upon the railroad company to show the contrary;" and in Railway Company v. Tompkins, 176 U. S. 167, 173 that "the case must be a clear one in behalf of the railroad company or the legislation of the State must be upheld."

In Smyth v. Ames, 169 U. S. 466, 541 it expressed itself as follows:

"In our judgment it must be held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State can not justify unreasonably low rates for domestic transportation, considered alone, upon the

ground that the carrier is earning large profits on its interstate business over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business."

118

The proofs which have been taken by me relate to the traffic over the road of the complainant between Indianapolis and the Illinois State line during the years 1904, 1905 and 1906. It has been possible to ascertain with sufficient certainty from the way bills of the complainant the gross earnings upon the transportation of classified freight during those years between points within the State, and I find and report that they were as follows:

1904	$79,803.80
1905	91,097.53
1906	102,241.15

These earnings were upon rates fixed by the complainant during a period immediately preceding the proposed reduction of them by the order of the Railroad Commission which became effective on February 1, 1907.

119

Schedules of rates as fixed by the complainant and by the Railroad Commission being fully set forth in the bills of complaint are not reproduced here.

It is more difficult to ascertain the expenses that were incident to these earnings, and it is impossible to ascertain them exactly. Many expenses of freight and passenger traffic are blended in such a way as to preclude an accurate separation of them. The customary method of ascertaining the amount of expenses that is chargeable against different kinds of traffic is a process of separation or apportionment, or both separation and apportionment. All expenses that are distributable are distributed, and all expenses that are undistributable are apportioned. Undistributable expenses of freight and passenger traffic are apportioned between them according to the mileage of trains. But such an apportionment of expenses between different kinds of freight, or between interstate and domestic, or interstate freight which is transported in the same cars to and from different points in and out of the State, is plainly impracticable.

In the present case the complainant has adopted, as the only practicable method of ascertaining the expenses incident to the transportation of classified freight between points upon its road within the State, an apportionment of them upon the ratio of all operating expenses to the whole earnings from every source upon the road between Indianapolis and the Illinois State line during the year

120

1904, and upon the St. Louis division, which extends from Indianapolis to St. Louis, during the years 1905 and 1906, the percentage of expenses being as follows:

1904	72.64
1905	73.93
1906	72.64

It does not appear from the evidence that any unusual or improper items of expense were included in the computation of the ratio of operating expenses to the earnings, and the maintenance of practically the same ratio during the whole of the period under consideration denotes regularity.

According to this method, which has the approval of the Supreme Court, in Smyth v. Ames, supra, and Railway Co. v. Tompkins, supra, the operating expenses chargeable against earnings upon the transportation of classified freight covered by the order of the Railroad Commission between points within the State would have been as follows:

121	1904	$70,453.83
	1905	66,506.64
	1906	74,267.97

The gross earnings during that period under the schedule of rates prescribed by the Railroad Commission, making a reduction of 34% and 34.5% in the actual amount of them, would have been as follows:

1904	$72,222.12
1905	60,979.13
1906	66,936.99

There would have been accordingly a deficit or loss to the complainant upon the transportation of such freight during these years as follows:

1904	$7,231.71
1905	6,427.51
1906	7,330.98

The cost of handling freight over the platform at Indianapolis terminal was estimated according to the tonnage in 1905, by a witness for the complainant, at 70.4 cents per ton, which is in substantial accord with other evidence.

There has not been any evidence introduced by the defendants which impeaches the general accuracy of these figures. They have been sharply questioned and criticized, but they can not be rejected.

122 If there be any difference in the ratio of operating expenses to earnings in the transportation of domestic or local freight and interstate or through freight, it sufficiently appears from the testimony that the expense in the case of domestic or local freight

is greater than in the case of interstate or through freight. In the absence of such testimony "it is obvious on a little reflection" as was said by the Supreme Court in Railway Co. v. Tompkins, supra, that "the cost of moving local freight is greater than that of moving through freight, and equally obvious that it is almost if not quite impossible to determine the difference with mathematical accuracy."

Other methods of ascertaining the cost of transportation according to the tonnage and by comparison with other roads have been suggested, but they require more facts than are disclosed by the evidence, and upon the facts as disclosed by the evidence I find and report that the method adopted by the complainant is the only practicable one in the present case.

For the foregoing reasons I also find and report as a fact that the schedule of rates prescribed by the Railroad Commission of Indiana, if enforced, would reduce the earnings of the complainant below its operating expenses; and I further find and report as a conclusion of law that the enforcement of the order of the Rail-
123 road Commission would deprive the complainant of its property without due process of law within the meaning of the Constitution of the United States and in violation of its provisions.

Respectively submitted,

NOBLE C. BUTLER,
Special Master in Chancery.

124 Mr. Smith: Now, may the Court please, I offer in evidence a certified copy of the original petition filed by Schnull & Company before the Railroad Commission, referred to in the complaint.

Mr. Pickens: Can we not agree that our former objections to the document any evidence offered may go to this without repeating the grounds of objection.

The Court: Is that agreeable to you gentlemen?

Mr. Smith: Yes.

The Court overruled the objection.

To which ruling of the court the defendant, by counsel, at the time excepted.

So the said original petition, so offered, was admitted and read in evidence and marked Exhibit No. 3, the same being in the words and figures following, to wit:

125 EXHIBIT No. 3.

12/ 4.16.

"STATE OF INDIANA:

Railroad Commission of Indiana.

No. 6.

SCHNULL & Co., Petitioners,

vs.

VANDALIA R. R. Co., Respondent.

Your petitioner, above named, respectfully complains of the respondent, above named, and says that your petitioner resides at Indianapolis and is engaged in the business of Wholesale Grocer at Indianapolis, in said State, and that the respondent is engaged in the business of a common carrier at Indianapolis, in said State.

That the respondent, above named, is denying the petitioner certain rights and privileges contrary to the laws of said State, in this: First: That said Vandalia Railroad Company is charging the following class rates governed by Official Classification from Indianapolis to Knightsville:

1	2	3	4	5	6
24 1-2	22	19.5	12 1-2	9	8

which are excessive and discriminating.

126 Wherefore, your petitioner demands that the respondent be required to: First: Reduce said rates to:

1	2	3	4	5	6
11	9 1-2	8	7	6	5

(Signed) GEO. G. GRIFFIN,
Petitioner, of Firm of Schnull & Co.

Subscribed and sworn to before me this 3rd day of July, 1905.
(Signed) JOHN W. RHODEHAMEL,
[SEAL.] *Notary.*

My Commission expires Nov. 22, 1908.

STATE OF INDIANA,
Marion County, ss:

I, J. L. Reiley, Secretary of the Public Service Commission of Indiana, do hereby certify that the above is a true and correct copy of

the original petition in case No. 6—R. R. Com., Schnull & Co., vs. Vandalia R. R. Co., on file in my office.

Witness my hand and seal this 1st day of December, 1916.

(Signed) J. L. REILEY,
Secretary."

Indianapolis, Indiana."

127 Mr. Smith: Now, may the Court please, I offer in evidence the certified copy of the Amended Petition filed by Schnull & Company versus the Vandalia Railroad Company on August 30th, 1905.

Mr. Pickens: It is understood that our objection is repeated to each one of these documents?

Mr. Smith: Yes.

The Court overruled the objection.

To which ruling the Defendant, by counsel, at the time excepted.

So the said certified copy of the Amended Petition was admitted and read in evidence, and marked Exhibit No. 4, the same being in the words and figures following, to wit:

128 EXHIBIT No. 4.

12/4/16.

STATE OF INDIANA:

Railroad Commission of Indiana.

No. 6.

SCHNULL & COMPANY, Petitioner,
vs.
VANDALIA RAILROAD COMPANY, Respondent.

Amended Petition.

1. Your petitioner above named, for amended petition, respectfully complains of the respondent, above named, and avers that your petitioner is a partnership engaged in the wholesale grocery business in the City of Indianapolis, Marion County and State of Indiana, and that it is now and for fifteen years last past has been engaged in selling groceries to its customers in the towns and cities located along the line of railroad of said respondent as hereinafter described, and that your petitioner has been and is not shipping over respondent's said railroad from the City of Indianapolis to said towns and cities located on said Railroad groceries sold by said petitioner to its said customers, and in the future will continue to sell and
129 ship to said customers in said cities and towns.

2. Your petitioner further avers that said respondent is a corporation organized and existing under the laws of the State of Indiana,

and owns and operates a system of steam railroads in said state, and is engaged as a common carrier of passengers and freight for hire; that said respondent owns and operates, among other of its lines of railroads, a railroad line extending from said city of Indianapolis westward in said State of Indiana to the Illinois State line, and continuing westward to East St. Louis in the State of Illinois, which said line is commonly known as the St. Louis Division of the Vandalia Railroad Company. That the following named stations, towns and cities are located along respondent's said railroad in the State of Indiana, to wit: Ben Davis, Bridgeport, Oakplain, Plainfield, Gibson, Cartersburg, Clayton, Pecksburg, Amo, Coatsville, Fillmore, Alemeda, Greencastle, Limedale, Hamrick, Reelsville, Eagles, Harmony, Knightsville, Brazil, Turner, Staunton, Cloverland, Seelyville, Prairie, Terre Haute, Macksville, Liggett and Nelson.

3. Your petitioner further avers that said respondent has established and fixed rates for carrying freight from the City of Indianapolis over its said line of railroad to each said station, town
130 and city above named; that all freight shipped or to be shipped over said road is classified into six groups or classes as shown by the "official Classification No. 26" now on file in the office of the Secretary of this Honorable Commission, which said official classification your petitioner begs leave to refer to, and to be considered as a part of this amended petition the same as if written into it. That said rates are figured in cents per hundred pounds based on said classification, according as said freight may belong to the first, second, third, fourth, fifth and sixth classification of freight, respectively.

4. That said rates in cents per hundred pounds from Indianapolis for each said classification of freight to each said station, town or city in Indiana along respondent's said railroad are as shown in the following table of rates. Said table consists of nine columns, in the third of which appears the name of each said station, town and city located on said line of railroad in Indiana, and the rates for each classification of freight from Indianapolis to each said station, town and city are set opposite the name of each said station, town and city respectively in the six columns to the right of said
131 names, said six columns being headed: "Rate in cents per 100 pounds. Classes." and numbered 1, 2, 3, 4, 5 and 6 respectively to indicate the class of freight; that is to say, the figures in column numbered one are the rates for first class freight, in column numbered two for second class freight, in column numbered three for third class freight, in column numbered four for fourth class freight, in column numbered five for fifth class freight, and in column numbered six for sixth class freight, each said class being specifically enumerated in said "Official Classification No. 26." That the figures in the column headed "Station No." to the right of the column containing the names of the stations, towns and cities, indicate the station numbers adopted by respondent company, each said station town and city being known by the station number set opposite its name in said column.

That the second column under the head of "Miles" shows the number of miles from Indianapolis to each said station, town or city on said line of railroad in the State of Indiana. Said table is as follows, towit:

132 Class Freight Scale Now in Force on Vandalia-St. Louis Division (From Indianapolis).

Rates in Cents per 100 Pounds.

Station No.	Miles.	To—	Classes. 1	2	3	4	5	6
1	00	Indianapolis						
2	6.1	Ben Davis	10	9	8	7	5	4
3	8.8	Bridgeport	12	11	10	8	6	5
4	13.6	Oakplain	15	13	11	9	6½	5½
5		Plainfield						
6		Gibson						
7	16.9	Cartersburg	18	15	12	10	7	6
8	20.1	Clayton						
11	22.8	Pecksburg	20	18	14½	11	8	7
12	24.9	Amo						
13	28.0	Coatsville						
14	32.6	Fillmore	22	20	17	12	9	8
15		Alemeda						
16	38.9	Greencastle						
17	40.3	Limedale						
18	43.8	Hamrick	24½	22	19½	12½	9	8
19	47.3	Reelsville						
20	50.4	Eagles						
21	53.6	Harmony						
22	54.8	Knightsville						
23	56.9	Brazil						
24	59.0	Turner	25	22	19½	12½	9½	8
25	60.9	Staunton						
26		Cloverland						
27	65.2	Seelyville						
29		Prairie						
30	72.7	Terre Haute						
31	75.1	Macksville						
32	77.7	Liggett						
33	79.1	Nelson						

133 5. Your petitioner further avers that said respondent is now charging for the transportation of freight from Indianapolis to said stations, towns and cities respectively, the rate or rates in cents per hundred pounds as shown by the figures in the above

and foregoing table of rates as based on said classification of freight; that said rates and each and every one of them is and are unjust, unreasonable and discriminative to your petitioner and all other shippers similarly situated with your petitioner, in that said rates and each of them for each said classification are too high; that said respondent practically has no competition in hauling freight between Indianapolis and all towns located on this side of and the other side of Terre Haute, Indiana, and said respondent therefore can and does arbitrarily fix said rates for the transportation of freight on all classes of freight at an unjust and unreasonable figure, and compels your petitioner and all other shippers over its said line to pay same, which rates are more than the services rendered by said respondent are reasonably worth, in disregard to the rights of the public and your petitioner.

6. Your petitioner further avers that the rates for the
134 transportation of freight, as shown by the following table of rates, would be a reasonable and just charge by respondent for hauling freight from said city of Indianapolis to each said station, town and city on its said road, and would give to said respondent a reasonable return for services rendered by it. That said table of rates hereinafter appearing in this amended petition is in every respect similar to the table of rates set out in item number four of this petition, with the exception that the figures of rates set out in the column under the heading "Rate in cents per 100 pounds. Classes," are changed to what your petitioner believes and avers to be just and reasonable rates. Said table of rates as changed is as follows, to wit:

135 Rates in Cents per 100 Pounds.

Station No.	Miles.	To—	Classes. 1	2	3	4	5	6
1	0.0	Indianapolis						
2	6.1	Ben Davis	6	6	5	5	4	4
3	8.8	Bridgeport						
4		Oakplain						
5	13.6	Plainfield	6	6	5	5	4	4
6		Gibson						
7	16.9	Cartersburg						
9	20.1	Clayton						
11	22.8	Pecksburg	7½	6½	6	5	4	4
12	24.9	Amo						
13	28.0	Coatsville						
14	32.6	Fillmore	9	7½	7	6	5	4
15		Alemeda						
16	38.9	Greencastle						
17	40.3	Limedale						
18	43.8	Hamrick	10	9	8	7	6	5
19	47.3	Reelsville						
20	50.4	Eagles						
21	53.6	Harmony	11	9½	8	7	6	5
22	54.8	Knightsville						
23	56.9	Brazil						
24	59.0	Turner						
25	60.9	Staunton						
26		Cloverland	12	10½	9	8	7	6
27	65.2	Seelyville						
29		Prairie						
30	72.7	Terre Haute	14	12	10	8½	7	6
31	75.1	Macksville						
32	77.7	Liggett						
33	79.1	Nelson						

136 Wherefore, your petitioner prays that the rates for the transportation of freight as the same now exist on all classes of freight from said city of Indianapolis to each and every station, town and city on said respondent's said line of railroad, be altered, changed and amended so as to conform to the said table of rates appearing in item six of this amended petition; or, your petitioner prays for a reduction of all rates as the same now exist for the transportation of all classes of freight from Indianapolis to each said

station, town and city on respondent's said line of railroad in the state of Indiana, as in the judgment of this Honorable Commission may seem just and reasonable to your petitioner and said respondent; and your petitioner prays all other and further relief in the premises.

(Signed) SMITH & KORBLY,
Attorneys for Petitioner.

137 STATE OF INDIANA,
County of Marion, ss:

George G. Griffin, being first duly sworn upon his oath deposes and says that he is a member of the firm of Schnull & Company, the petitioner in the above and foregoing petition, and that he makes this affidavit for and on behalf of said petitioner; that the facts set forth in the above and foregoing petition are true, as affiant verily believes.

(Signed) GEO. G. GRIFFIN.

Subscribed and sworn to before me this 30th day of August, 1905.

(Signed) JOHN W. RHODEHAMEL,
[SEAL.] *Notary Public.*

My Commission expires November 22, 1908.

I, J. L. Reily, Secretary of the Public Service Commission of Indiana, do hereby certify that the above and foregoing is a true, correct and complete copy of the amended petition filed in case No. 6—R. R. Comm., Schnull & Co. vs. Vandalia R. R. Co., and now on file in my office.

Witness my hand and seal this 1st day of December, 1916.

(Signed) J. L. REILY,
Secretary.

Indianapolis, Indiana.

138 Mr. Smith: Now, may the Court please. I want to put in evidence a stipulation found in the Transcript at pages 198 and 199—the Transcript in the case of William J. Woods et al. vs. Vandalia Railroad Company.

The defendant's objection being renewed, the Court overruled it. To which ruling of the Court the defendant, by counsel, at the time excepted.

So the said Stipulation was admitted and read in evidence, and marked Exhibit No. 5, the same being in the words and figures following, towit:

EXHIBIT No. 5.

12/4/'16.

"Stipulation.

"Mr. Williams: It is stipulated that the rates named in the bill of complaint from Indianapolis to the stations between Bridgeport

and Gibson are the same as to Gibson, and that the rates from Indianapolis to the stations between Gibson and Clayton are the same as to Clayton; and that the rates from Indianapolis to the
139 stations between Clayton and Coatesville are the same as the rates to Coatesville; and that the rates from Indianapolis to the stations between Coatesville and Limedale are the same as to Limedale; and that the rates to the station between Limedale and Brazil are the same as to Brazil; and that the rates to the stations between Brazil and Nelson are the same as to Nelson."

Mr. Wmith: Now, if your Honor please, I read in evidence page 9 from this Transcript in the case of Woods vs. Vandalia Railroad Company.

The defendant's objection being renewed, was overruled by the Court, to which ruling the defendant excepted.

So the said page nine of the Transcript in said case was admitted and read in evidence, and marked Exhibit No. 6, the same being in the words and figures following towit:

140 EXHIBIT NO. 6.

12/4/1916.

"Between Indianapolis and the Following Stations:

Rates in Cents per Hundred Pounds.

	Classes.					
	1	2	3	4	5	6
Ben Davis	10	9	8	7	5	4
Bridgeport	12	11	10	8	6	5
Gibson	15	13	11	9	6.5	5.5
Clayton	18	15	12	10	7	6
Coatsville	20	18	14.5	11	8	7
Limedale	22	20	17	12	9	8
Brazil	24.5	22	19.5	12.5	9	8
Nelson	25	22	19.5	12.5	9.5	8

That in August, 1905, said defendants, Schnull, Griffin and Griffin, under the name and style of Schnull and Company, instituted proceedings before the Railroad Commission of Indiana to secure a reduction of the rates established and charged by the complainant as aforesaid, claiming therein that said rates were in excess of what would be a reasonable compensation to complainant for the services rendered in handling and carrying classified freight to which said rates were applicable, and that in said proceedings under the date of December 14, 1906, the Railroad Commission of Indiana made and entered the following order." Which order is set forth on page 17 of this transcript.

141 Mr. Smith: That is simply a copy of the schedule filed with their bill, your Honor.

Now, I offer in evidence a certified copy of the summons issued by the Railroad Commission and served on the Vandalia Railroad Company.

The objection of the defendant being renewed was overruled by the Court.

To which ruling of the Court the defendant, by counsel, at the time excepted.

So the certified copy of the summons, so offered, was admitted and read in evidence and marked Exhibit No. 7, the same being in the words and figures following, to wit:

EXHIBIT No. 7.

12/4/'16.

"Summons.

THE STATE OF INDIANA:

The Railroad Commission of Indiana to any sheriff or constable in Marion County, Greeting:

You are hereby commanded to forthwith notify Vandalia Railroad Company *XC* July 6 Edward Graham, Agt. that on this date
142 Schnull & Co. has filed its petition with said Commission against said respondent, a copy of which accompanies this summons for delivery by you to said respondent. The said respondent is required by said Commission, within five days after the service of this summons, to grant the relief asked in such petition and file with the Commission and mail to petitioner's counsel a written or printed satisfaction of the petitioner's demands. If the satisfaction tendered by the respondent is acceptable to the petitioner and the Commission, an order will be entered by the Commission accordingly. If satisfaction is not made, or, if made, and is not acceptable to the petitioner, then the respondent, within ten days from the service thereof, shall file with such commission an answer to such petition, and mail a copy thereof to petitioner's attorney. The cause will stand for trial ten days after service is complete as to all respondents, unless otherwise ordered by the Commission before that time.

In witness whereof, the Secretary of the Railroad Commission of Indiana has hereunto set his hand and affixed the seal of said Commission, at its office in the City of Indianapolis, Indiana, this 5th day of July, A. D., 1905.

(Signed) CHAS. B. RILEY,
Secretary."

143 (On Back.)

This writ was served on the 6th day of July, 1905, by reading the same to and within the hearing of Edward Graham, who is Agent of the within named respondent, and by delivery to him of a true copy hereof, and by delivery to him of the copy of the petition ac-

companying this summons, and I hereby certify that said Edward Graham is the agent of the within named respondent found in my county.

(Signed) EDWARD G. SOURBRIER,
Sheriff Marion County."

144 (On fold:) "Copy. No. 6. Railroad Commission of Indiana. Summons. Schnull & Co. vs. Vandalia Railroad Company. To Marion County. Returned July 6, 1905. Served July 6, 1905. Chas. B. Riley, Secretary.

Fees Taxed.

(Same as in Civil Cases, L. C.)

Mileage	
Service	$20
Copy	40
Docket	25
	20
Total,	$1.05

145 "STATE OF INDIANA,
Marion County, ss:

"I, J. L. Reiley, Secretary of the Public Service Commission of Indiana, do hereby certify that this is a true and correct copy of a Summons and the return of the Sheriff thereon on file in my office in case No. 6, R. R. Com., Schnull & Co. vs. Vandalia Railroad Company.

Witness my hand and seal this 28th day of November, 1916.

[Public Service Commission of Indiana Seal.]

(Signed) J. L. REILEY,
Secretary."

146 Mr. Smith: Now, may the Court please, I offer in evidence certified copy of the letter of M. C. Downing, Superintendent of the Vandalia Company, acknowledging receipt of the copy of that order. It is dated Terre Haute, Indiana, December 15th, 1906.

The objection of the defendant being renewed was overruled by the Court.

To which ruling of the Court the defendant, by counsel, at the time excepted.

So the said certified copy, so offered, was admitted and read in evidence, and marked Exhibit No. 8, the same being in the words and figures following, to-wit:

EXHIBIT No. 8.

12/4/'16.

"Vandalia Railroad Company.

Office of the Superintendent.

W. C. Downing.

Terre Haute, Indiana, Dec. 15, 1916.

147 Mr. Charles R. Riley,
Secretary Railroad Commission of Indiana,
Indianapolis, Indiana.

DEAR SIR:

I have your letter of December 14th, and beg to acknowledge receipt of the certified copy of the order of the Railroad Commission of Indiana in the case of Schnull and Company vs. the Vandalia Railroad Company.

Yours truly,
(Signed) W. C. DOWNING,
Superintendent."

"I, J. L. Reiley, secretary of the Public Service Commission of Indiana, do hereby certify that the above is a true and correct copy of a letter on file in my office in case No. 6, R. R. Comm., Schnull & Co. vs. Vandalia Railroad Company.

Witness my hand and seal this 29th day of November, 1916.

[Public Srvice Commission of Indiana Seal.]

(Signed) J. L. REILEY,
Secretary."

148 Mr. Smith: Now I offer in evidence, may the Court please, a certified copy of the decree of the Supreme Court of the United States on that appeal—on the appeal in the case of William J. Wood, et al., vs. Vandalia Railroad.

The objection of the defendant being renewed was overruled by the Court.

To which ruling of the Court the defendant, by counsel, at the time excepted.

So the said certified copy of the decree, so offered, was admitted and read in evidence, and marked Exhibit No. 9, the same being in words and figures following, to-wit:

EXHIBIT No. 9.

12/4/'16.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the District of Indiana, Greeting:

Whereas, lately in the Circuit Court of the United States
149 for the District of Indiana, in the cause between Vandalia Railroad Company, complainant, and Union B. Hunt, William J. Wood, Charles V. McAdams, James Bingham, Elliott R. Hooton, Gustav A. Schnull, William J. Griffin and George G. Griffin, defendants, No. 10,663, Chancery, wherein the decree of the said Circuit Court, entered in said cause on the 29th day of June, A. D., 1909, is in the following words, viz:

"On this day the exceptions of the defendants, filed herein on the fifth day of April, 1909, to the report of the Special Master filed herein on the sixth day of March, 1909, came on to be heard, and the same having been argued by counsel for the complainant and the defendants, respectively, and the Court being fully advised in the premises, now overrules each and all of said exceptions, and it is now ordered and adjudged that the report of the Special Master be, and the same is in all respects confirmed.

The motion of the defendants to dismiss this cause, filed herein on the tenth day of June, 1909, also coming on to be heard, and the same having been argued by the counsel for the parties, respectively, and the Court being fully advised in the premises, now overrules said motion.

150 And this cause is now set down for final hearing on the bill of complaint, the amendment thereto filed May 4, 1907, the answer, the replication, the report of the Special Master filed herein on the sixth day of March, 1909, with the testimony and exhibits and other evidence accompanying the same, and the Court having heard the arguments of counsel for the parties, respectively, and being fully advised in the premises, now finds that the equities are with the complainant and that complainant is entitled to the relief prayed in the bill of complaint.

It is therefore now ordered, adjudged and decreed by the Court that he order of the Railroad Commission of Indiana, made and entered under date of December 14, 1906, effective February 1, 1907, establishing maximum rates for the complainant in the transportation of traffic moving over its lines to all points from Indianapolis to the Indiana-Illinois State line as then classified by the complainant and being the order of said Railroad Commission of Indiana set forth in the bill of complaint herein, be set aside and held void and of no force or effect as and from and after the date thereof.

It is further ordered, adjudged and decreed by the Court that the defendants Union B. Hunt, William J. Wood and Charles V.
151 McAdams, composing the Railroad Commission of the State of Indiana, and the successors in office of each and all of them, and defendant James Bingham, Attorney General of the State of Indiana, and defendant Elliott R. Heaton, Prosecuting Attorney in and for the County of Marion, State of Indiana, and each and all of the successors in office of said Bingham and said Heaton, respectively, be, and they are hereby perpetually enjoined and restrained from instituting or prosecuting, or causing to be instituted or prosecuted any suit or suits against the complainant for the recovery of any penalty or penalties claimed to be recoverable under any law of the State of Indiana, because of complainant's non-compliance with said order of the Railroad Commission of Indiana, dated December 14, 1906, and effective February 1, 1907.

It is further ordered, adjudged and decreed by the Court that defendants Gustav A. Schnull, William J. Griffin and George G. Griffin, and each of them, and any and all other persons similarly situated with them as shippers or receivers of freight included within said order of the Railroad Commission of Indiana, be perpetually enjoined and restrained from instituting or prosecuting any suit or suits against the complainant for overcharges or damages of
152 any kind claimed on account of complainant's non-compliance with said order of the Railroad Commission of Indiana, dated December 14, 1906, and effective February 1, 1907.

It is further ordered, adjudged and decreed that the defendants pay the complainant all its costs in this behalf expended to be taxed by the Clerk of this Court."

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal taken by William J. Wood, John F. McClure, Frank E. Payne, Gustave A. Schnull, William J. Griffin and George G. Griffin, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirteen, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed with costs; and
153 that the said William J. Wood et al. recover against the said complainant, Vandalia Railroad Company, Four Hundred and thirty-six dollars and fifteen cents for their costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the District of Indiana, with direction to dismiss the bill without prejudice.

October 20, 1913.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 28th day of November, in the year of our Lord one thousand nine hundred and thirteen.

(Signed) JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Costs of William J. Wood et al.:

Clerk	$173.15
Printing Record	243.00
Attorney	20.00
	$436.15

154 (Endorsement on Mandate:) "File No. 22,242. Supreme Court of the United States No. 11, October Term, 1913. William J. Wood, et al. vs. Vandalia Railroad Company. Mandate. Filed Dec. 1, 1913. Noble C. Butler, Clerk.

155 Supreme Court of the United States, October Term, 1913.

Costs of William J. Wood et al. in No. 11.

1910, October Term. Docketing cause and filing record, $5.00; appearance, .25; filing precipe, .25; filing papers, $1.00; continuance, .25	$6.75
1911, October Term. Transfer, $1.00; appearance .25; filing precipe and receipts, .75; filing papers, $2.00; filing motion .25; submission, .20; order, .20; continuance, .25	4.90
1912, October Term. Transfer $1.00; appearance .25; filing precipe and receipt, .50; filing papers $2.25; filing briefs $5.00; argument .20; continuance .25	9.45
1913, October Term. Transfer $1.00; filing papers $1.50; judgment $1.00; filing same .25; recording .40; Mandate $5.00; preparing record for printer, etc., $142.50; cost of printing record, $243.00; attorney's docket fee $20.00; costs and copy, .40	415.05
	$436.15

Fee Book, page 22,242.

Test:

JAMES D. MAHER,
Clerk of the Supreme Court of the United States."

156 Mr. Smith: Now, your Honor, I offer in evidence the certified copy of the official motion in the United States Circuit Court of this District on the return of that mandate.

The objection of the defendant being renewed was overruled by the Court.

To which ruling of the Court the defendant, by counsel, at the time excepted.

So the said certified copy so offered was admitted and read in evidence, and marked Exhibit No. 10, the same being in the words and figures following, to wit:

EXHIBIT No. 10.

12/4/'16.

"In the District Court of the United States for the District of Indiana, November Term, 1913.

December 1, 1913.

Before the Honorable Albert B. Anderson, Judge.

157 No. 10663.

In Equity.

VANDALIA RAILROAD COMPANY

vs.

UNION B. HUNT, WILLIAM J. WOOD, CHARLES B. MCADAMS, JAMES Bingham, Elliott R. Hooton, Gustav A. Schnull, William J. Griffin, George G. Griffin.

Come now the Defendants by Charles W. Smith, Esq., their Solicitor, and file the Mandate and decree of the Supreme Court reversing the decree of this Court in the above entitled cause and remanding the same, with direction to dismiss the Bill of Complaint without prejudice, with costs of said Court, and it is thereupon ordered, adjudged and decreed on the motion of the Defendants that the Bill of Complaint be and the same is hereby dismissed without prejudice and that the Defendants have and recover of and from the Complainant, the Vandalia Railroad Company, the sum of $436.15 as and for their costs as aforesaid and have execution for the same as at law."

158 "In the District Court of the United States for the District of Indiana.

I, Noble C. Butler, Clerk of the District Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of Mandate of Supreme

Court of the United States in the cause of William J. Wood, et al., vs. Vandalia Railroad Company, filed in the District Court of the United States for the District of Indiana on the first day of December, 1913, and Decree of said District Court entered on the first day of December, 1913, in the above entitled cause, as the same appears of record in my office.

Witness my hand and the seal of said Court, at Indianapolis, in said District, this 20th day of November, 1916.

[Seal of District Court of United States, District of Indiana.]

(Signed) NOBLE C. BUTLER,
Clerk.

159 Mr. Smith: Now, may the Court please, I will offer in evidence pages 41 to 49 of the Transcript in the case of Wood vs. Vandalia Railroad Company, Pages 41 to 42—on pages 41 and 42 is the original judgment by Judge Anderson making a perpetual injunction, on the hearing before him. That is the judgment that was appealed from to the Supreme Court. Then, from page 43 to 49 is the Application for Appeal by the defendant in that cause, with an endorsement at the foot of the application:

"The foregoing appeal is hereby allowed, this 20th day of May, 1911."

The objection of the defendant being renewed was overruled by the Court.

To which ruling of the Court the defendant, by counsel, at the time excepted.

So the said original judgment of Judge Anderson, and the Application for Appeal, so offered, were admitted and read in evidence, and marked, the Judgment Exhibit No. 11, and the Application for Appeal, No. 12, the same being in the words and figures following, to wit:

160 EXHIBIT No. 11.

12/4/'16.

"And afterwards, to-wit, at the May Term of said Court, on the 29th day of June, 1909, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

On this day the exceptions of the defendants filed herein on the fifth day of April, 1909, to the report of the special master filed herein on the sixth day of March, 1909, came on to be heard and the same having been argued by counsel for the complainant and the defendants, respectively, and the Court being fully advised in the premises, now overrules each and all of said exceptions, and it is now ordered and adjudged that said report of the Special Master be, and the same is in all respects confirmed.

The motion by the defendants to dismiss this cause, filed herein on the tenth day of June, 1909, also coming on to be heard, and the same having been argued by the counsel for the parties, respectively, and the Court being fully advised in the premises, now overruled said motion.

And this cause is now set down for final hearing on the bill of complaint, the amendment thereto filed May 4, 1907, the answer, the replication, the report of the special master filed herein on the
161 sixth day of March, 1909, with the testimony and exhibits and other evidence accompanying the same, and the Court having heard the arguments of counsel for the parties, respectively, and being fully advised in the premises, now finds the equities are with the complainant and that complainant is entitled to the relief prayed in the bill of complaint.

It is therefore now ordered, adjudged and decreed by the court that the order of the Railroad Commission of Indiana made and entered under date of December 14, 1906, effective February 1, 1907, establishing maximum rates for the complainant in the transportation of traffic moving over its lines to all points from Indianapolis to Indiana-Illinois State line as then classified by the complainant and being the order of said Railroad Commission of Indiana set forth in the bill of complaint herein, be set aside and held void and of no force or effect as and from and after the date thereof.

It is further ordered, adjudged and decreed by the court that the defendants Union B. Hunt, William J. Wood and Charles V. McAdams, composing the Railroad Commission of the State of Indiana, and the successors in office of each and all of them, and defendant James Bingham, Attorney General of the State of Indiana, and defendant Elliott R. Hooton, Prosecuting Attorney in and for
162 the County of Marion, State of Indiana, and each and all of the successors in office of said Bingham and said Hooton, respectively, be, and they are hereby perpetually enjoined and restrained from instituting or prosecuting, or causing to be instituted or prosecuted any suit or suits against the complainant for the recovery of any penalty or penalties claimed to be recoverable under any law of the State of Indiana, because of complainant's non-compliance with said order of the Railroad Commission of Indiana, dated December 14, 1906, and effective February 1, 1907.

It is further ordered, adjudged and decreed by the Court that defendants Gustave A. Schnull, William J. Griffin and George G. Griffin, and each of them, and any and all other persons similarly situated with them as shippers or receivers of freight included within said order of the Railroad Commission of Indiana, be perpetually enjoined and restrained from instituting or prosecuting any suit or suits against the complainant for over charges or damages of any kind claimed on account of complainant's non-compliance with said order of the Railroad Commission of Indiana, dated December 14, 1906, and effective February 1, 1907.

It is further ordered, adjudged and decreed that the defend-
163 ants pay the complainant all its costs in this behalf expended to be taxed by the clerk of this court."

EXHIBIT No. 12.

12/4/'16.

And afterwards, towit, at the May Term of said Court, on the 9th day of May, 1910, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Come now William J. Wood, Gustav A. Schnull, William J. Griffin, and George G. Griffin, and John F. McClure as successor to the above named defendants, Union B. Hunt, as a member of the Railroad Commission of Indiana, and Frank E. Payne, as successor to the above named defendant, Charles V. McAdams, as a member of said Railroad Commission of Indiana, and file in this cause a notice and request to join in an appeal of said cause heretofore served on Union B. Hunt, Charles V. McAdams, James Bingham and Elliott R. Hooton, which said notice and request was and is in the words and figures following, towit:

Union B. Hunt, Charles V. McAdams, James Binghim, and Elliott R. Hooton, you and each of you are hereby notified
164 that the above named defendants, William J. Wood, Gustav A. Schnull, William J. Griffin, and George G. Griffin, and John F. McClure, as successor to the above named defendant, Union B. Hunt, as a member of the Railroad Commission of Indiana, and Frank E. Payne, as successor to the above named defendant, Charles V. McAdams, as a member of said Commission, are proposing to join in a petition to be filed in the Circuit Court of the United States, for the District of Indiana, praying an appeal from the final decree, duly made and entered in the above entitled cause in equity on the 29th day of June, 1909, which petition is in these words:

In the Circuit Court of the United States for the District of Indiana.

VANDALIA RAILROAD COMPANY, Complainant,

vs.

UNION B. HUNT, WILLIAM J. WOOD, CHARLES V. MCADAMS, JAMES Bingham, Elliott R. Hooton, Gustav A. Schnull, William J. Griffin and George G. Griffin, Defendants.

William J. Wood, Gustav A. Schnull, William J. Griffin and George G. Griffin, defendants above named, and John F. McClure, successor to said above named defendant, Union B. Hunt, as
165 a member of the Railroad Commission of Indiana, and Frank E. Payne, a successor to the above named defendant, Charles V. McAdams, formerly a member of said Railroad Commission, feeling themselves aggrieved by the finad decree given in the above entitled cause in equity on the 29" day of June, 1909, whereby it was adjudged and decreed that an order of the Railroad Commission of Indiana, made and entered under date of December 14, 1906, effec-

tive February 1, 1907, establishing maximum rates for the complainant in the transportation of classified freight moving over its line of railroad to all points from Indianapolis to the Indiana-Illinois State line, as then classified by the complainant, and being the order of said Railroad Commission of Indiana set forth in the bill of complaint in the above entitled cause, to be set aside and held void, and of no force and effect from and after said date.

Whereby it was also adjudged and decreed that the above named defendants, Union B. Hunt, William J. Wood and Charles V. McAdams, at the commencement of said cause composing the Railroad Commission of the State of Indiana, and the successors in office of each and all of them, and the above named defendant James Bingham, attorney general of the State of Indiana, and defendant,
166 Elliott R. Hooton, prosecuting attorney in and for the County of Marion, State of Indiana, and each and all of the successors in office of said James Bingham and Elliott R. Hooton, be perpetually enjoined and restrained from instituting or prosecuting, or causing to be instituted or prosecuted, any suit or suits against the complainant for the recovery of any penalty or penalties claimed to be recoverable under any law of the State of Indiana, because of complainant's non-compliance with said order of the Railroad Commission of Indiana, dated December 14, 1906, effective February 1, 1907, and that the above named defendants, Gustav A. Schnull, William J. Griffin, George G. Griffin, and each of them, and any and all persons similarly situated with them as shippers or receivers of freight, included within the order of said Railroad Commission of Indiana, be perpetually enjoined and restrained from instituting or prosecuting any suit or suits against the complainant for overcharges or damages of any kind claimed on account of complainant's non-compliance with said order of the Railroad Commission of Indiana, dated December 14, 1906, and effective February 1, 1907.

Your petitioners would further respectfully represent and show to the Court that the above named defendants, Union B.
167 Hunt, and Charles V. McAdams, were at the time the above entitled cause was begun, members of the Railroad Commission of the State of Indiana, as aforesaid, but that before the said decree therein was made and entered both of said defendants had resigned as members of said Commission, and their said resignation had been duly accepted and their successors appointed; that said petitioner John F. McClure, was appointed as a member of said commission as successor to said defendant, Union B. Hunt; that one Henry M. Dowling was appointed successor on said commission to said Charles V. McAdams, and was a member of said Railroad Commission on the date when said decree was made and entered as aforesaid; that subsequent to said date when said decree was made and entered, as aforesaid, to-wit, on the 1st day of January, 1910, said Henry M. Dowling duly tendered his resignation as a member of said Commission, which resignation was duly accepted, and said petitioner Frank E. Payne, was duly appointed to succeed said Henry M. Dowling upon said Commission, and that said Railroad Commission is now composed of said above named defendant, William J.

Wood, and your petitioners John F. McClure and Frank E. Payne, and none other.

That said above named defendants, Union B. Hunt and
168 Charles McAdams, are no longer connected with said Railroad Commission, and no longer have any interest in this case, or the decree entered therein; that said Henry M. Dowling is no longer a member of said Railroad Commission, and has no interest therein or in said decree, or any appeal therefrom; that said Union B. Hunt, Charles V. McAdams and Henry M. Dowling, and each of them, have been duly served with a request to join in this petition, and in the appeal herein prayed for, but that each and all of them have refused and do refuse to so join; that said defendants, James Bingham and Elliott R. Hooton have each been served with notice of this petition and request to join in this appeal, and both said James Bingham and Elliott R. Hooton have refused, and still refuse to join in this petition or in said appeal, which notice of this petition and request to said Union B. Hunt, Charles V. McAdams, James Bingham, Elliott R. Hooton, and Henry M. Dowling, with their acknowledgement of service thereof, and with the refusal of each and all of them to join in this petition, and in the appeal from said decree, are filed herewith.

And now said defendants William J. Wood, said John F. McClure, and Frank E. Payne, successors as aforesaid, Gustav A.
169 Schnull, William G. Griffith, and George G. Griffin, by James Bingham, attorney general, their solicitor, come and petition this court for an order allowing said defendants and said John F. McClure and Frank E. Payne, as successors to membership in the Railroad Commission, as aforesaid, to prosecute an appeal from said decree to the Supreme Court of the United States, under and according to the laws of the United States in this behalf made, and pray that this appeal may be allowed, and that a transcript of the record and proceedings upon which decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

And your petitioners further pray that said notice and request to said Union B. Hunt, Charles V. McAdams, Henry M. Dowling, James Bingham and Elliott R. Hooton, and their several refusals to join in this petition, and in an appeal from said decree, be made a part of the record in this cause, and that proper order of severance be made in the premises for the purposes of this appeal.

Dated March 29th, 1910. JAMES BINGHAM,
Attorney General.

170 And you, and each of you, are hereby requested to join in said petition for an appeal, and you and each of you are hereby requested to join in an appeal from said decree entered in the above entitled cause in equity on the 29th day of June, 1909, which is more fully identified and described in the proposed petition aforesaid.

Dated this 29th day of March, 1910.

JAMES BINGHAM,
Attorney General, Solicitor for Defendants and Petitioners for Appeal.

I hereby acknowledge service of the foregoing notice and request this 29th day of March, 1910.

UNION B. HUNT.
JAMES BINGHAM.
HENRY M. DOWLING (April 8, 1910).
ELLIOT R. HOOTON, *Pros. Att'y.*
CHARLES V. McADAMS.

And the said named persons also file the following declaration of the said Union B. Hunt, Charles V. McAdams, Elliot R. Hooton and James Bingham to join in the petition to appeal from the decree in said cause, and the refusal of each of said above named persons to appeal therefrom, and also the declination of Henry Dowling,
171 who was the successor on said Railroad Commission of Indiana to Charles V. McAdams, and who was succeeded on said Railroad Commission of Indiana by Frank E. Payne, which said declinations were and are in the words and figures as follows, to-wit:

To defendants, William J. Wood, Gustav A. Schnull, William J. Griffin, and George G. Griffin, and Petitioners, John F. McClure, and Frank E. Payne, and to the Circuit Court of the United States for the District of Indiana:

You, and each of you, are hereby notified that I am the Union B. Hunt who is named as defendant in the cause entitled Vandalia Railroad Company, Complainant, vs. Union B. Hunt, William J. Wood, Charles V. McAdams, James Bingham, Elliot R. Hooton, Gustav A. Schnull, William J. Griffin and George G. Griffin, Defendants, In Equity, in the Circuit Court of the United States for the District of Indiana, in which final decree was duly made and entered on the 29th day of June, 1909, which decree is more particularly described and referred to in the foregoing notice and request, and that I will not join in a petition to appeal from said decree in said cause, or in said petition referred to in said foregoing notice and request, or any other petition for appeal from said decree, and that I will not individually appeal therefrom, and I
172 hereby decline to join in said petition referred to in said notice and request or any other petition for such appeal, and I also hereby decline to join in an appeal from said decree, and also to appeal from said decree as an individual.

Dated this 29th day of March, 1910.

UNION B. HUNT.

173 To Defendants, William J. Wood, Gustav A. Schnull, William J. Griffin, and George G. Griffin and Petitioners, John F. McClure and Frank E. Payne, and to the Circuit Court of the United States for the District of Indiana:

You, and each of you, are hereby notified that I am the Charles V. McAdams who is named as defendant in the cause entitled Van-

dalia Railroad Company, Complainant, vs. Union B. Hunt, William J. Wood, Charles V. McAdams, James Bingham, Elliot R. Hooton, Gustav A. Schnull, William J. Griffin and George G. Griffin, Defendants, In Equity, in the Circuit Court of the United States for the District of Indiana, in which final decree was duly made and entered on the 29th day of June, 1909, which decree is more particularly described and referred to in the foregoing notice and request, and that I will not join in a petition to appeal from said decree in said cause, or in said petition referred to in said foregoing notice and request, or any other petition for appeal from said decree, and that I will not individually appeal therefrom, and I hereby decline to join in said petition referred to in said notice and request or any other petition for such appeal, and I also hereby decline to join in an appeal from said decree, and also to appeal from said decree as an individual.

Dated this 1st day of April, 1910.

CHARLES V. McADAMS.

174 To Defendants, William J. Wood, Gustav A. Schnull, William J. Griffin, and George G. Griffin, and Petitioners, John F. McClure and Frank E. Payne, and to the Circuit Court of the United States for the District of Indiana:

You, and each of you, are hereby notified that I am the Elliott R. Hooton, who is named as defendant in the cause entitled Vandalia Railroad Company, Complainant, vs. Union B. Hunt, William J. Wood, Charles V. McAdams, James Bingham, Elliot R. Hooton, Gustav A. Schnull, William J. Griffin and George G. Griffin, Defendants, In Equity, in the Circuit Court of the United States for the District of Indiana, in which final decree was duly made and entered on the 29th day of June, 1909, which decree is more particularly described and referred to in the foregoing notice and request, and that I will not join in a petition to appeal from said decree in said cause, or in said petition referred to in said foregoing notice and request, or any other petition for appeal from said decree, and that I will not individually appeal therefrom, and I hereby decline to join in said petition referred to in said notice and request or any other petition for such appeal, and I also hereby decline to join in an appeal from said decree, and also to appeal from said decree as an individual.

Dated the 1st day of April, 1910.

ELLIOT R. HOOTON.

175 To Defendants, William J. Wood, Gustav A. Schnull, William J. Griffin, and George G. Griffin, and Petitioners, John F. McClure and Frank E. Payne, and to the Circuit Court of the United States for the District of Indiana:

You, and each of you, are hereby notified that I am the James Bingham who is named as defendant in the cause entitled Vandalia Railroad Company, Complainant, vs. Union B. Hunt, William J. Wood, Charles V. McAdams, James Bingham, Elliot R. Hooton,

Gustav A. Schnull, William J. Griffin and George G. Griffin, Defendants, In Equity, in the Circuit Court of the United States for the District of Indiana, in which final decree was duly made and entered on the 29th day of June, 1909, which decree is more particularly described and referred to in the foregoing notice and request, and that I will not join in a petition to appeal from said decree in said cause, or in said petition referred to in said foregoing notice and request, or any other petition for appeal from said decree, and that I will not individually appeal therefrom, and I hereby decline to join in said petition referred to in said notice and request or any other petition for such appeal, and I also hereby decline to join in an appeal from said decree, and also to appeal from said decree as an individual.

Dated this 7th day of April, 1910.

JAMES BINGHAM.

176 To Defendants, William J. Wood, Gustav A. Schnull, William J. Griffin, and George G. Griffin, and Petitioners, John F. McClure and Frank E. Payne, and to the Circuit Court of the United States for the District of Indiana:

You, and each of you, are hereby notified that I am the Henry Dowlin who is named as defendant in the cause entitled Vandalia Railroad Company, Complainant, vs. Union B. Hunt, William J. Wood, Charles V. McAdams, James Bingham, Elliot R. Hooton, Gustav A. Schnull, William J. Griffin and George G. Griffin, Defendants, In Equity, in the Circuit Court of the United States for the District of Indiana, in which final decree was duly made and entered on the 29th day of June, 1909, which decree is more particularly described and referred to in the foregoing notice and request, and that I will not join in a petition to appeal from said decree in said cause, or in said petition referred to in said foregoing notice and request, or any other petition for appeal from said decree, and that I will not individually appeal therefrom, and I hereby decline to join in said petition referred to in said notice and request or any other petition for such appeal, and I also hereby decline to join in an appeal from said decree, and also to appeal from said decree as an individual.

Dated this 8th day of April, 1910.

HENRY M. DOWLING.

177 And the said named William J. Wood, Gustav A. Schnull, William J. Griffin, George G. Griffin, John F. McClure and Frank E. Payne having prayed for an order of substitution and severance in said cause, and the Court being duly advised in the premises, it is now in consideration whereof ordered, adjudged and decreed by the Court that the said John F. McClure be substituted in the place of Union B. Hunt, and that the said Frank E. Payne be substituted in place of the said Charles V. McAdams, and that the said McClure and Payne be allowed to prosecute an appeal from the decree in the above entitled cause, and that an order of severance be and is hereby granted, allowing said defendant to appeal from said decree without

joining Union B. Hunt, Charles V. McAdams, James Bingham, Elliott R. Hooton or Henry Dowling, and that each and all of said last above named persons be and hereby are forever debarred from prosecuting any appeal whatsoever from the decree in the above entitled cause.

And afterwards, to wit, at the May Term of said Court, on the 20th day of May, 1910, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to wit:

178 Come now William J. Wood, John F. McClure, Frank E. Payne, Gustav A. Schnull, William J. Griffin and George C. Griffin, defendants and substituted defendants herein, by counsel and file their petition for appeal and assignment of errors in the words following, to wit:

William J. Wood, John F. McClure, Frank E. Payne, Gustav A. Schnull, William J. Griffin and George G. Griffin, defendants and substituted defendants in the above entitled cause, feeling themselves aggrieved by the final decree made in the above entitled cause in Equity, dated the 29th day of June, 1909, whereby it was adjudged and decreed that an order of the Railroad Commission of Indiana made and entered under date of December 14th, 1906, effective February 1st, 1907, establishing maximum rates for the complainant in the transportation of traffic moving over its lines to all points from Indianapolis to the Indiana-Illinois state line as then classified by the complainant, be set aside and held void and of no force or effect, and that each and all of the defendants be perpetually enjoined and restrained for enforcing said order or prosecuting or causing to be instituted or prosecuted any suit or suits against the complainant for the recovery of any penalties claimed to be recoverable under any law in the State of Indiana because of complainant's non-com-

179 pliance with said order of the Railroad Commission, and enjoined and restrained from instituting or prosecuting any suit or suits against the complainant for over-charges or damages on account of complainant's non-compliance with said order of the Railroad Commission of Indiana, now come by James Bingham, attorney General of Indiana, their solicitor, and petition this court for an order allowing said defendants to prosecute an appeal from said decree to the Supreme Court of the United States under and according to the laws of the United States in this behalf made, and pray that this appeal may be allowed and that a transcript of the record and proceedings upon which said decree was made duly authenticated may be sent to the Supreme Court of the United States.

Dated this 20th day of May, 1910.

JAMES BINGHAM,
Attorney General,
Solicitor for Defendants.

The foregoing appeal is hereby allowed this 20th day of May, 1910.

ALBERT B. ANDERSON,
Judge."

180 Mr. Smith: Plaintiffs offer in evidence page 77 of said transcript of the case of William J. Wood, et al., vs. Vandalia Railroad Company, in the Supreme Court of the United States—beginning with the language, "John H. Buchanan, produced as a witness on behalf of the complainant, being first duly sworn, testified as follows", and continuing to the word "Cross-examination" of the same record on page 79.

The objection by defendant being renewed is overruled by the court. To which ruling defendant, by counsel, at the time excepts.

Page 77, beginning with the language, "John H. Buchanan, produced as a witness," et cetera, to the word, "Cross-examination" on page 79, was read in evidence, marked by the Reporter "Exhibit No. 12-a, and is in the words and figures following, to wit:

Exhibit No. 12-a.

"John H. Buchanan, produced as a witness on behalf of the complainant, being first duly sworn, testified as follows:

181 Direct examination.

Questions by Mr. Jno. G. Williams:

Q. State your name, Mr. Buchanan?
A. John H. Buchanan.
Q. Where do you live, Mr. Buchanan?
A. At Terre Haute.
Q. What is your business?
A. I am in the Treasurer's Department now. I am Chief Clerk to the Assistant Treasurer.
Q. Where, in what office?
A. The Vandalia Railroad Company.
Q. What were you doing before that time? Were you in the Auditor's Office?
A. Yes.
Q. With Mr. Roney?
A. Yes.
Q. Are you the gentleman Mr. Roney detailed to make a statement of the earnings on traffic originating and ending on the line between here and the Illinois state line?
A. Yes sir, I was.
Q. For what years did you do that?
A. For the years 1904, 1905, and 1906.
Q. State to the Master what the earnings were for the year 1904 on freight originating on the line between here and Terre Haute, between here and the Illinois State line, and ending on that
182 same line; classified freight, I mean?
A. Do you mean, Mr. Williams, the earnings on the freight originating and ending on the line between here and Terre Haute?
Q. No; let me state that over again; state the revenue derived

from classified freight, the six classes of freight, during the year ending December 31st, 1904, on freight which originated on the line between here and the Illinois state line and which ended on that same line?

A. $79,803.80.

Q. Now what were the earnings on the same kind of freight between the same points, that is classified freight, beginning and originating between here and the Illinois State line, and ending on that same line, in 1905?

A. $91,067.56.

Q. What were those earnings for 1906?

A. $102,241.15.

Q. Now, Mr. Buchanan, what would the earnings have been in 1904, had the rates ordered by the Commission been collected instead of the company's rates that were actually collected?

A. In 1904 $52,222.12.

Q. What would those earnings have been for 1905 had the
183 Commission rates been collected instead of the actual company rates that were collected?

A. $60,079.13.

Q. And what would those earnings have been in 1906 had the Commission rates been collected instead of the company's rates that were actually collected?

A. $66,936.99.

Q. Now, Mr. Buchanan, turning again to the earnings that were actually made in 1904, tell us what the earnings for the year 1904 were on the classified freight originating at Indianapolis and ending on the line between Indianapolis and the Illinois state line?

A. You want the total of the classified freight?

Q. Just for Indianapolis west; total of the classified freight from Indianapolis west.

A. $36,204.52.

Q. Now, what were the earnings for the year 1905, on all classified freight originating at Indianapolis and ending on the line between Indianapolis and the Illinois state line?

A. $40,203.34.

Q. And what were they for the year 1906?

A. $43,487.20.

Q. Now, what would those earnings have been in 1904, had the rates ordered by the Indiana Commission been applied in-
184 stead of the Company's actual rates that were actually collected?

A. $23,347.68.

Q. And what would those earnings have been in the year 1905, on that freight had the Commission's rates been applied instead of the Company's rates?

A. $26,108.09.

Q. And what would those earnings have been in 1906 had the Commission's rates been applied instead of the Company's rates?

A. $27,583.46.

Mr. HEWITT H. LINGLE, witness called on behalf of the plaintiff, being duly sworn to tell the truth, the whole truth, and nothing but the truth, testifies as follows:

Direct examination.

Questions by Mr. Smith:

Q. Please state your name to the court.
A. H. H. Lingle.
Q. Where do you live?
A. Oaklandon.
185 Q. In whose employ are you at this time?
A. Schnull & Company.
Q. For how long have you been with them?
A. Since June, 1913.
Q. And in what branches of the work down there have you had to do, Mr. Lingle?
A. Well, I run the elevators and do the billing.
Q. Then after that what?
A. Billing, billing the orders, is what I said.
Q. How long have you been billing orders?
A. Since January, 1914.
Q. What do you mean, Mr. Lingle, by billing the orders?
A. Well, I itemize the orders and bill them; that is, I send the customers the bills of goods.
Q. Will you please speak louder?
A. I say that I itemize the orders and send the customers the bill for their goods.
Q. And then where are those billing orders preserved, if at all, in your office?
A. They are preserved in our office in binders. That is, the orders are preserved in the binders.
Q. And what is done with that billing order after it is first prepared?
A. It is posted; the bookkeepers use them for posting; then they are turned over to be bound.
Q. And after the shipping order or the billing order is made out, what becomes of that order, Mr. Lingle?
186 A. It is bound and kept on file.
Q. What relation does that have to the bill of lading or the freight bill?
A. Well, the bill of lading is made out in the office from the order sheet and goes out and is checked up. The order by the shipping clerk is sent to the freight house and signed up and comes back and then is filed.
Q. Filed where?
A. It is filed on file in the office.
Q. Yes. Those are the ones you say are preserved in binders?
A. Yes.
Q. Now, I will ask you if you have recently at my request prepared a tabulation showing the amount of goods that were shipped

under the schedules of classified rates—from Schnull & Company to the various points between here and Terre Haute—showing the amounts of the goods—for the period say commencing the first of June, 1915 and continuing to the 31st day of December, 1915.

A. I have.

Q. I will ask you if the binders from which this tabulation has been made are present in court for examination if desired.

A. Yes, sir.

Q. I will ask you if this (indicating) is the tabulation you
187 have spoken of—marked "Exhibit No. 13, Plaintiff"?

A. That is one of them.

Q. Now, I will ask you if by refreshing your recollection by that (indicating), you can tell us the amount of goods in pounds that were shipped over the Vandalia Railroad Company, covered by the classified rates for the month of June—the very stations to which they were shipped by Schnull & Company?

A. Yes, sir.

Q. Now can you give us like information as to the amount of goods shipped by Schnull & Company over the same line of road for the month of July, 1915?

A. Yes, sir.

Q. And for the month of August?

A. Yes, sir.

Q. And can you give us like information for the month of September?

A. Yes, sir.

Q. And October?

A. Yes, sir.

Q. And November?

A. Yes, sir.

Q. And December, 1915?

A. Yes, sir.

188 Q. I will ask you if these amounts are set down on the paper which I now show you?

A: Yes, sir.

Cross-examination waived.

And further the witness saith not.

Mr. Smith: Plaintiffs now offer in evidence paper marked "Exhibit No. 13", which is a tabulation of shipments made over the Vandalia Railroad, covered by the classified rates, and which amounts have been identified by the witness—shipments made by Schnull & Company.

Objection by defendant is renewed, which objection is by the Court overruled. To which ruling defendant, by counsel, at the time excepts.

Exhibit No. 13 is read in evidence to the Court in the words and figures following, to-wit:

180-190

EXHIBIT No. 13.

"Shipments Made Over the Vandalia Railroad from Indianapolis, Indiana, to Terre Haute, Indiana, and Intermediate Points from June First to December Thirty-first, 1915.

From Indianapolis, Ind., To—	Miles.	June.	July.	Aug.	Sept.	Oct.	Nov.	Dec.	Total.
Ben Davis.....	6	.....	.....	.....	.....	.....	.....	.....	.....
Bridgeport	9	.....	.....	.....	.....	.....	.....	.....	.....
Oak Plain	11	.....	.....	.....	.....	.....	.....	.....	.....
Plainfield	14	.....	.....	520	.....	.....	.....	.....	520
Gibson	15	.....	.....	.....	.....	.....	.....	.....	.....
Cartersburg ...	17	.....	.....	.....	.....	.....	.....	.....	.....
Clayton	20	2,478	155	.....	.....	.....	.....	.....	2,633
Pecksburg	23	.....	.....	.....	.....	.....	.....	.....	.....
Amo	25	3,552	449	.....	1,466	142	2,439	1,261	9,309
Coatesville	28	2,595	.....	2,825	1,090	423	317	155	7,405
Fillmore	33	1,859	1,050	2,093	510	1,355	784	569	8,220
Almeda	36	.....	.....	.....	.....	.....	.....	.....	.....
Greencastle ...	39	329	70	.....	.....	.....	.....	.....	399
Limedale	40	.....	.....	.....	.....	.....	.....	.....	.....
Hamrick	44	.....	.....	.....	.....	.....	.....	.....	.....
Reelsville	47	.....	.....	.....	.....	.....	.....	.....	.....
Eagles	50	.....	.....	.....	.....	.....	.....	.....	.....
Harmony	54	.....	.....	.....	.....	.....	.....	.....	.....
Knightsville ..	55	2,624	2,541	1,302	2,385	2,600	3,300	3,826	18,578
Brazil	57	9,524	10,332	10,328	17,405	18,444	16,451	17,394	99,878
Turner	59	.....	85	.....	205	150	.....	204	644
Staunton	61	250	557	631	629	100	1,545	1,400	5,112
Cloverland ...	63	.....	.....	.....	.....	.....	.....	.....	.....
Seelyville	65	.....	.....	350	1,000	165	.....	.....	1,515
Prairie	71	.....	.....	.....	.....	.....	.....	.....	.....
Terre Haute...	73	6,848	3,770	4,105	6,255	16,313	10,381	4,483	52,155
Total.... ..		30,059	19,009	22,154	30,945	39,692	35,217	29,292	206,368"

(End of Exhibit No. 13.)

Mr. WILLIAM J. GRIFFIN, witness called on behalf of the plaintiffs, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testifies as follows:

Direct examination.

Questions by Mr. Smith:

Q. Please state your name to the court.
A. William J. Griffin.
Q. What is your business, Mr. Griffin?
A. I am in the wholesale grocery business—I am a member of the firm of Schnull & Company.
Q. How long have you been in the wholesale grocery busi-
191 ness?
A. As partner, or as employe, do you mean? From the beginning?
Q. From the beginning, yes.
A. Since 1882.
Q. How long have you been in the business as a member of the firm of Schnull & Company?
A. As partner, since 1892 or '3, I don't recall exactly.
Q. Do you know whether that firm—Schnull & Company—sell goods over the line of railroad between here and Terre Haute?
A. They do.
Q. And for how long a time have they been engaged in so selling?
A. Well, ever since I have been in the business. In any capacity they have been doing it.
Q. Do they have any competitors in that business over that line?
A. They do.
Q. Will you tell us some of them?
A. Well, one time we had here in Indianapolis twelve—I think there are eight or nine now. Do you want the names?
Q. Yes; in the last two or three years.
A. Well, the Indianapolis Fancy Grocery Company, L. C.
192 Nicholson Company, George C. Brinkmeyer & Company, the Grocers' Supply Company, J. C. Perry & Company, J. P. Michael Company, Kothe, Wells & Bauer Company, C. A. Shrader Company, and we have some in Terre Haute.
Q. Where are some of those? What are their names?
A. Hammel & Company, the Bennett-Ray Company, Joseph Strauss & Company, C. W. Boenemeister Company, and for a while we had a wholesale grocery house in Brazil, which was later dissolved by Hammel & Company.
Q. Have you any other competitors between here and Terre Haute?
A. Do you mean over the Vandalia Railroad?
Q. Yes.
A. We have had all over the country.
Q. I will ask you, Mr. Griffin, if you know Mr. Charles F. Zice?
A. I do.
Q. Where does he live?
A. In Greencastle, Indiana.

Q. In what business is he?
A. The retail grocery and packing business.
Q. What, if any, dealing has your company had with Mr. Zice?
A. We have sold him merchandise, shipped him merchandise—sold it to him, and collected money for it.
193 Q. For how long have you been dealing with him?
A. I will have to refresh my memory on that.
Q. All right, if you care to.
A. Since October 27th, 1910.
Q. Do you know a gentleman by the name of William R. Elliott?
A. I do.
Q. Who is he?
A. He is a grocer at Plainfield, Indiana.
Q. What business relation have you had with him, if any?
A. The same as with Mr. Zice.
Q. What was that?
A. Shipped goods to him, sold him merchandise, shipped it to him and collected money for it.
Q. And made the shipments over the Vandalia Railroad?
A. Yes.
Q. And how long have you been engaged in business dealings with him?
A. Well, we began dealing with him under the firm name of Nyce-wander & Elliott, December 1st, 1905, and sold him continuously from January 12th, 1909, up to the present date.
Q. And where is his place of business?
A. In Plainfield, Indiana.
Q. Do you know Arthur W. Jones?
A. Not personally, no.
194 Q. Do you know what his business is?
A. He is in the retail grocery business.
Q. How do you know that?
A. Through dealings we have had with him through our salesmen and through the commercial reports.
Q. How long have you been dealing with him?
A. Since September 24th, 1907.
Q. And what is his business?
A. He is in the retail grocery business.
Q. Where?
A. In Brazil, Indiana.
Q. Do you know S. S. Gonter & Company?
A. Not personally. I know they are in the grocery business. We have sold them goods, shipped them goods, and collected from them.
Q. What is the firm name?
A. S. S. Gonter & Company.
Q. Who composes the firm?
A. I don't know who the company is.
Q. Whereabouts do they do business?
A. In Brazil, Indiana.
Q. Do you know a firm by the name of Schaefer & Collier?
A. I do. I know Schaefer personally. I don't know Mr. Collier.
Q. In what business are they?

A. They are in the retail grocery business in Brazil, Indiana.
195 (Answer continued:) I knew them first as Schaefer & Campbell; began dealing with them in 1901 in June and then knew them after December, 1905 as Schaefer & Collier.
Q. Do you know Clarence C. Nicholas?
A. Not personally, no, sir.
Q. Well, in what way have you been in touch with him?
A. Through our representatives, through the mails—we have sold them goods, shipped them goods and collected for them.
A. Since when?
A. Since October 22nd, 1908.
Q. And where is their place of business?
A. Brazil.
Q. Do you know any firm doing business under the name of S. F. Adamson & Son?
A. I do, but not personally.
Q. How do you know them?
A. Through our representatives, through the mails—we have sold them goods, shipped them goods and collected for them.
Q. Do you know who composes that firm?
A. S. F. Adamson and his son; I think his name is Ralph, I am not sure.
Q. We have it here Claude.
A. Well, yes, that is right.
Q. Where are the- located in business?
196 A. In Knightsville.
Q. Do you know Alex. W. Davis?
A. Not personally, I know him in the same way that I know S. F. Adamson & Son. We began dealing with both of them in 1901. We sold him goods through the salesmen and by mail and shipped to him and collected for the goods. They are in Knightsville Indiana.
Q. And you made some of the shipments, at least, to them over the Vandalia?
A. Yes sir.

Cross-examination waived.
And further the witness saith not.

Mr. GEORGE G. GRIFFIN, witness called on behalf of the plaintiffs, being duly sworn to tell the truth, the whole truth, and nothing but the truth, testifies as follows:

Direct examination.

Questions by Mr. Smith:
Q. Please state your name to the court.
A. George G. Griffin.
197 Q. What is your business?
A. Wholesale grocery business.
Q. With whom are you, under what name do you do business?
A. Under the firm name of Schnull & Company.
Q. With whom are you in partnership?
A. Gustav A. Schnull, William J. Griffin.

Q. I will ask you what connection you have had with the attempt to secure a modification of the Vandalia Railroad Classified rate list, which was in force prior to August, 1905?

A. Very close connection. I have been in touch with the various concerns, with objections filed before the Indiana Railroad Commission and with the hearing in the Federal Court—and have been connected with and in touch with the various hearings since the consolidation.

Q. Well, from the time of the entry of the order of the Railroad Commission made on December 14th, 1906, to become effective on the 1st of February, 1907, what change has there been in the rates, or the classified freight rates as charged and collected by the Vandalia Railroad Company?

Witness: I did not get that.

Mr. Smith: I withdraw the question.

Q. What, if any change has been made in the charges
198 made by the Vandalia Railroad Company for the carrying of the classified freight set down in the schedules of the Vandalia Railroad in force prior to the month of August, 1905?

Mr. Smith: I withdraw that question.

Questions by Judge Remster:

Q. Are you acquainted with the classified rate charges—freight charges for the Vandalia Railroad from Indianapolis west to the state line, and were you acquainted in August, September, October, November and December of 1905?

A. Yes.

Q. Has there been any change in those rates since that time?

A. None.

Q. They are the same today as they were then?

A. The same.

Q. They were the same all that time and in the intervening time?

A. All the time and intervening.

Questions by Mr. Smith:

Q. These rates have been charged and collected by the Vandalia Railroad Company?

A. Yes.

199 Judge Remster: And they are the same rates that Schnull & Company complained about in their petition filed with the Railroad Commission in 1905?

Witness: Yes.

Q. How long have you been in the wholesale grocery business here?

A. Something over twenty-five years.

Q. How long has your firm been seeling goods that were shipped under the classified rates over the Vandalia Railroad between here and the west line of the state of Indiana?

A. For over twenty-five years.

Q. Do you know of any other person shipping like goods coming in competition with you at these various points?
A. Yes.
Q. How many?
A. I could not even attempt to say how many hundreds.
Q. Many or few?
A. A great many.
Q. Large or small amounts?
A. Both large and small amounts.
Q. Well, in the aggregate, great or small?
A. Great.

Cross-examination waived.

And further the witness saith not.

200 *Stipulation.*

It is stipulated by and between the parties in this cause that the defendant herein has not prosecuted any action or suit in any court or courts affecting or concerning the order heretofore entered by the Railroad Commission of Indiana on December 14th, 1906, which order is set forth in the complaint in this case, other than the suit brought by said company in the Circuit Court of United States for the District of Indiana, entitled Vandalia Railroad Company vs. Union B. Hunt, William J. Wood, et al., being cause No. 10663 on Chancery side of said Court, and further that this defendant has not prosecuted any appeal from said order of the Railroad Commission of Indiana, made on December 14th, 1906, pursuant to any of the provisions contained in the Act of the General Assembly of the State of Indiana of 1905, creating a railroad commission of Indiana, at any time.

And the plaintiffs here rested.

Whereupon, the defendant, to maintain the issues on its behalf, offered and introduced the following evidence, to-wit:

201 Mr. Pickens: Defendant offers in evidence "Exhibit No. 14", being a copy of the petition of the Vandalia Railroad Company in the case of Schnull & Company vs. Vandalia Railroad Company, before the Public Service Commission of Indiana for a rehearing of that cause, and for the suspension of the order entered in that cause on December 14th, 1906, said petition having been filed with the Public Service Commission of Indiana on the 12th day of November, 1913, and which petition is marked "Exhibit No. 14, Defendant," in this cause.

Mr. Smith: Plaintiffs object to the admission of this testimony on the ground that there is no issue in this case in which it is admissible. There is no pleading before the court that there was a pleading—there was a pleading and the demurrer was sustained to it, that they had asked for a rehearing. Therefore, there is no issue in which this matter is competent. Secondly, on the face of it this is not a

petition for rehearing. It was a petition for a rehearing and a suspension of an order, and it was so treated, as is shown by the order—It is not a petition for a rehearing, but a petition for a rehearing and a suspension of an order—it is asking for the immediate suspension of an order which the Supreme Court declined to grant.

202 Court: The objection is overruled.

To which ruling of the court plaintiffs, by counsel, at the time separately and severally except.

Exhibit No. 14 is read to the court in the words and figures as follows:

203 EXHIBIT No. 14.

Before the Public Service Commission of Indiana.

SCHNULL & COMPANY

vs.

VANDALIA RAILROAD COMPANY.

"The petition of Vandalia Railroad Company, respondent in the above entitled case, being number six (6) on the docket of the Railroad Commission of Indiana, respectfully shows:

"The order of the Railroad Commission of Indiana establishing a maximum schedule of class rates over your petitioner's line west from Indianapolis, Indiana to the Indiana-Illinois state line, was entered December 14, 1916, to become effective February 1, 1917. Prior to this last named date your petitioner filed a suit in the Circuit Court of the United States for the District of Indiana, asking that this order be adjudged void on the ground that if enforced your petitioner would be compelled to carry the traffic covered by it at less than the actual cost of such carriage, and as a result your petitioner would be deprived of its property without due process of law, in violation of section one (1), article fourteen (15) of the Constitution of the United States, and in that suit, on the 29th day of June, 1909, a final decree was entered granting all the relief prayed in the

204 bill of complaint therein. From this decree an appeal was allowed on May 20, 1910, to the Supreme Court of the United States, and on October 20, 1913, by the judgment of this last named court the decree in the court below was reversed, on the ground that your petitioner had failed to sustain its contention that the action of the Commission in ordering the reduction in rates complained of transcended the limits imposed by the Fourteenth Amendment, and remanded the case with directions to dismiss the bill without prejudice.

"Your petitioner says that the maximum schedule of rates established by the order of December 14, 1906, of the Railroad Commission of Indiana, is and always has been unreasonably low, and that an examination of that schedule will disclose the fact that the rates thereby established are much lower than they would be if constructed upon the basis of the minimum scale of the Central Freight Associa-

tion, which has repeatedly and uniformly been considered and held to be not unreasonable, and which is sought to be established as a reasonable scale in two proceedings now pending before the Commission, instituted by the complainants in the above entitled case.

"Your petitioner shows that in the years that have elapsed since the order of November 14, 1906, was made, the operating ex-
205 penses of your petitioner, together with those of all other railroad companies in the State of Indiana have largely increased, and as a result the percentage of operating expenses to earnings has largely increased, and that even if the schedule of rates sought to be established by the order of December 14, 1906, had then been reasonable, the same rates would not be entirely too low.

"Your petitioner says that its present schedule of class rates between Indianapolis and the Illinois line is higher than the minimum scale of the Central Freight Association, but that the question of the reasonableness of your petitioner's present rates has never been properly investigated or determined, and was neither involved nor decided in the suit brought by your petitioner to set aside the order of December 14, 1906, and if upon a further and proper investigation its present rates are found to be unreasonably high, your petitioner will promptly acquiesce in the establishment of a reasonable schedule, and in the meantime will aid the Commission in every way in ascertaining the facts necessary for the determination of the question involved.

"Wherefore, your petitioner respectfully prays that a rehearing of the above entitled case be granted and that the taking effect of the said order of December 14, 1906, be forthwith suspended pend-
206 ing the proceedings on such rehearing, and for all such other and proper relief in the premises as to the Commission may seem expedient and just.

VANDALIA RAILROAD COMPANY,
By JOHN G. WILLIAMS,
General Counsel."

(End of Exhibit No. 14.)

Mr. Pickens: Defendant now offers in evidence "Exhibit No. 15" in this cause, which is a copy of the order of the Public Service Commission in Schnull & Company vs. Vandalia Railroad Company, dated November 18, 1913, being a ruling by the Commission denying the petition of the Railroad Company for a rehearing and suspension of the order, and offered as a part of the last exhibit admitted.

Mr. Smith: To which plaintiffs object for the reason that it is not admissible in this cause.

Court: The objection is overruled and exception to plaintiffs, and each of them.

Exhibit No. 15 is read to the court in the words and figures as follows:

207 EXHIBIT No. 15.

"Public Service Commission of Indiana.

Commission's No. 6-357.

SCHNULL & COMPANY
vs.
VANDALIA RAILROAD COMPANY.

November 18, 1913.

Comes now Vandalia Railroad Company and files its petition for a hearing in the above entitled cause and for a suspension of the order heretofore entered by the Railroad Commission of Indiana in this cause.

And the Commission being advised in the premises, overrules and denies said petition. November 18, 1913.

Order Book 1, page 265."

(End of Exhibit No. 15.)

And the defendant here rested.

208 Whereupon, the Plaintiffs, to further maintain the issues on their behalf, offered and introduced the following evidence in rebuttal, to wit:

Judge Remster: Plaintiffs now offer in rebuttal "Exhibit No. 16," a letter to Mr. John G. Williams, General Counsel Vandalia Railroad Company, Indianapolis, Indiana, dated November 18, 1913, Note:

Important: Refer to file No. 357.

The letter is as follows:

209 EXHIBIT No. 16.

Indianapolis, Nov. 18, 1913.

Important: Refer to File No. 357.

Mr. John G. Williams, Gen. Counsel,
Vandalia R. R. Co.,
Indianapolis, Ind.

DEAR SIR:

"Relative to the petition filed by you in the case of Schnull & Company vs. The Vandalia Railroad Company, same being a petition for rehearing and suspension of order.

"I beg to advise that I have had the matter up with the Commis-

sion and after giving the same consideration it has decided not to grant a rehearing nor suspend the order. I may say that if a suit is brought to further contest the order, the Commission will consider the question of compromise rates. If on the other hand, the company concludes to put in rates as ordered and should thereafter file a new tariff establishing a new schedule of rates, the Commission would probably suspend the same in order to give you the opportunity to establish reasonableness of a proposed increase.

"The Commission, however, does not desire to grant a rehearing and enter upon a re-investigation of this subject.

Very truly yours,

(Signed) J. F. McCLURE."

(End of Exhibit No. 16.)

210 *Objection to Admission of Exhibit No. 16.*

Mr. Pickens: Defendant objects to the introduction of this letter from the court or the Commission explanatory of an order made in a proceeding, before the Commission, for the reason that it is wholly irrelevant and immaterial; it has nothing to do with the former proceedings.

The hour of 12:00 o'clock having arrived Court takes adjournment until two P. M.

Two P. M.

Court met pursuant to adjournment, and the trial of the cause was resumed.

Mr. Pickens: Defendant offers and additional objection to the introduction of "Exhibit No. 16"; it has been held by the United States Court in every case where the question has been presented that you cannot enter into the mental operations of a board to ascertain why they made such an entry in a record. The records must speak for themselves.

Mr. Smith: Your Honor, it is offered on the ground that it is a part of the history and toughing the duties of the Railroad Commission.

Court: The objection is sustained.

To which ruling of the court plaintiffs separately and severally except.

And this was all the evidence given in the cause.

211 *Reporter's Certificate.*

STATE OF INDIANA,
County of Marion, ss:

I, Dove Casady Meredith, Official Reporter of the Superior Court of Marion County, State of Indiana, Room 2, duly appointed and qualified, hereby certify that upon the trial of this cause, wherein Gustav A. Schnull, et al., are plaintiffs, and Vandalia Railroad Com-

pany is defendant, I took down in shorthand all of the oral evidence given and offered, including both questions and answers and the documentary evidence, and noted all of the objections made to the admission of evidence, the rulings of the Court as to the admission and rejection of evidence, and the exceptions taken thereto; that having been requested by the defendant to furnish it with a Typewritten Transcript of all of the proceedings so taken and noted by me upon the trial of said cause, I prepared the foregoing Transcript, and hereby certify that the same contains all the evidence given and offered in said cause, so taken by me upon said trial, at the time and place aforesaid.

JOVE CASADY MEREDITH,
Official Reporter Superior Court
of Marion County, Ind., Room 2.

212 *Judge's Certificate.*

And be further remembered, that the foregoing Typewritten Transcript of the evidence, so taken and reported, as aforesaid, contains all of the evidence, both oral and documentary, given and offered in said cause, with the objections made thereto, the rulings of the Court on said objections, and the exceptions taken thereto; and the same is now embodied in and made a part of a Bill of Exceptions; and on the 9th day of January, 1917, and within the time allowed by the Court so to do, the defendant tendered this its Bill of Exceptions, which contains the said Typewritten Transcript of the evidence, etc., so taken and reported as aforesaid, and prayed that the same might be signed, sealed and made a part of the Record in this cause; which is accordingly done, this 9th day of January, 1917, and the same is ordered to be certified by the Clerk of this Court, without copying, as a part of the Record of this cause.

LINN D. HAY,
Judge of the Superior Court of Marion
County, Indiana, Room 2.

Filed Jan. 9, 1917. Theodore Stein, Jr., Clerk.

213 STATE OF INDIANA,
County of Marion, ss:

Superior Court of Marion County, Room 2.

No. 100,535.

GUSTAV A. SCHNULL et al.
vs.
VANDALIA RAILROAD COMPANY.

Præcipe.

The Clerk of said Court will make out and certify under seal for appeal to the Supreme Court of Indiana a true and complete transcript of all proceedings had and papers filed in above entitled cause, except pleadings which have been superseded by such pleadings amended, and you will certify with the transcript defendant's original bill of exceptions containing the evidence and proceedings on the trial without copying the same, including in the transcript this præcipe.

December 23, 1916.

D. P. WILLIAMS,
PICKENS, MOORES, DAVIDSON & PICKENS,
Attorneys for Defendant.

214 STATE OF INDIANA,
County of Marion, ss:

Clerk's Certificate.

I, Theodore Stein, Jr., Clerk of the Superior Court of Marion County, Indiana, do hereby certify that the above and foregoing transcript contains full, true and correct copies of all the papers filed in said cause and entires of proceedings had in said cause as requested by the above and foregoing præcipe.

I further certify that I have incorporated in this transcript the original bill of exceptions containing the evidence in said cause instead of a copy thereof, all as requested by the above and foregoing præcipe.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Indianapolis, this 12 day of January, 1917.

[Seal of Superior Court of Marion County, Indiana.]

THEODORE STEIN, JR.,
Clerk Superior Court, Marion County, Ind.

Filed Jan. 15, 1917. J. Fred. France, Clerk.

215 STATE OF INDIANA:

In the Supreme Court.

VANDALIA RAILROAD COMPANY, Appellant,

vs.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN, GEORGE G. GRIFFIN, Composing the Firm of Schnull & Co.; Lawrence A. Busby, Charles F. Zies, William Ralph Elliott, Arthur W. Jones, Simon F. Gonter, and Joseph S. Gonter, Composing the Firm of S. F. Gonter & Co.; Carl C. Nicholas, Daniel W. Davis, Doing Business Under the Name and Style of Davis & Company; Samuel F. Adamson and Claude E. Adamson, Composing the Firm of S. F. Adamson & Son; Absolom Shaffer and William Collier, Composing the Firm of Shaffer & Collier, Appellees.

Filed Jan. 15, 1917. J. Fred France, Clerk.

Assignment of Errors.

The appellant says there is manifest error in the judgment and proceedings, prejudicial to appellant, in this cause in this:

(1) The court erred in overruling appellant's demurrer to appellee's complaint.

(2) The court erred in sustaining appellees' demurrer to the second paragraph of the appellant's answer to the complaint.

(3) The court erred in sustaining appellees' demurrer to the third paragraph of appellant's answer to the complaint.

(4) The court erred in overruling appellant's petition for suspension of the decree and injunction as prayed for in said petition.

(5) The court erred in overruling in part appellant's peti-
216 tion for suspension of the decree and injunction.

(6) The court erred in overruling appellant's motion to modify the order of suspension of the decree and injunction.

(7) The court erred in overruling appellant's motion for a new trial.

D. P. WILLIAMS,
PICKENS, MOORES, DAVIDSON & PICKENS,
Attorneys for Appellant.

Filed Jan. 15, 1917. J. Fred France, Clerk.

217 And afterwards to wit: On the 24th day of January, 1917, being the 51st Judicial Day of the November Term, 1916,

of said Supreme Court, the following further pleas and proceedings were had in said cause, to wit:

"Comes now the appellant by Counsel and files its motion to advance said cause.

And afterwards to wit: On the 25th day of January, 1917, being the 52nd Judicial Day of the November Term, 1916, of said Supreme Court, the following further pleas and proceedings were had in said cause, to wit:

"Come the parties by counsel and the Court being advised in the premises, grants the joint petition on file herein to advance the above entitled cause, and said cause is advanced.

And afterwards to wit: On the 14th day of February 1917, being the 69th Judicial Day of the November Term, 1916, of said Supreme Court, the following pleas and proceedings were had in said cause.

"Come now the parties by their Counsel and this cause is submitted to the court for judgment and decree as provided by an act of the General Assembly of the State of Indiana, approved April 13th, 1885, and the rules of said Supreme Court adopted in relation thereto.

And afterwards to wit: On the 13th day of April, 1917, being the 119th Judicial Day of the November Term, 1916, of said Supreme Court, the following pleas and proceedings were had in said cause.

"Comes now the appellant by counsel and files its brief (8) and its request for oral argument in the words and figures following:

218 And afterwards to wit: On the 5th day of May, 1917, being the 138th Judicial Day of the November Term, 1916, of said Supreme Court, the following further pleas and proceedings were had in said cause, to wit:

"Comes now the appellees by Counsel and file their brief (8) in the words and figures following:

And afterwards to wit: On the 2nd day of October, 1917, being the 110th Judicial Day of the May Term, 1917, of said Supreme Court, the following further pleas and proceedings were had in said cause, to wit:

"Comes now the appellees by Counsel and file their additional authorities (8) in the words and figures following:

And afterwards to wit: On the 31st day of May, 1918, being the 5th Judicial Day of the May Term, 1918, of said Supreme Court, the following further pleas and proceedings were had in said cause, to wit:

"Comes now the parties by Counsel, and the court being advised in the premises, sets the oral argument in the above entitled cause for June 4th, 1918, at 10 A. M., and notices thereof are duly issued.

And afterwards to wit: On the 8th day of June, 1918, being the 12th Judicial Day of the May Term, 1918, of said Supreme Court, the following further pleas and proceedings were had in said cause, to wit:

"Comes now the appellant by Counsel and files additional authorities (8) in the words and figures following:

219 And afterwards to wit: On the 19th day of December 1918, being the 22nd Judicial Day of the November Term 1918, of said Supreme Court, the following further pleas and proceedings were had in said cause, to wit:

"Comes now the parties by Counsel and the Court being advised in the premises request Counsel in this cause to file brief within ten days on certain points.

And afterwards to wit: On the 28th day of December, 1918, being the 30th Judicial Day of the November Term, 1918, of said Supreme Court, the following further pleas and proceedings were had in said cause, to wit:

"Comes now the appellees by Counsel and file brief (8) on suggestions of said Court in the words and figures following.

And afterwards to wit: On the 7th day of January 1919, being the 38th Judicial Day of the November Term, 1918, of said Supreme Court, the following further pleas and proceedings were had in said cause, to wit:

"Comes now the appellant by Counsel and files its brief (8) on suggestions of said Court in the words and figures following.

And afterwards to wit: On the 10th Day of January, 1919, being the 41st Judicial Day of the November Term, 1918, of said Supreme Court, the following further pleas and proceedings were had in said cause, to wit:

"Comes now the Appellant by Counsel and files its reply brief (8) on suggestions of Court in the words and figures following.

And on the same day the following further pleas and pro-
220 ceedings were had in said Court in said cause:

"Comes now the Appellant by Counsel and files its petition for leave to file reply briefs, and on the same day the Court being fully advised said petition was granted.

And afterwards to wit: On the 14th day of January 1919, being the 44th Judicial Day of the November Term, 1918, of said Supreme Court, the following further pleas and proceedings were had in said cause, to wit:

"Comes now the appellant by Counsel and file additional authorities (8) on suggestions of the Court, in the words and figures following:

And afterwards to wit: On the 15th day of January, 1919, being the 45th Judicial Day of the November Term, 1918, of said Supreme

Court, the following further pleas and proceedings were had in said cause, to wit:

"Comes now the appellees by Counsel and file their reply brief (8) on suggestions of the Court, in the words and figures following:

And afterwards to wit: On the 21st day of February, 1919, being the 77th Judicial Day of the November Term, 1918, of said Supreme Court, the following further pleas and proceedings were had herein:

Copy.

THE STATE OF INDIANA:

In the Supreme Court, November Term, 1918.

On the 21st day of February, 1919, being the 77th Judical Day of said November Term, 1918.

Hon. Lawson M. Harvey, Chief Justice; Hon. Moses B. Lairy, Hon. Howard L. Townsend, Hon. David A. Myers, Hon. Benjamin M. Willoughby, Associate Justices.

221 No. 23204.

In the Case of

VANDALIA RAILROAD COMPANY

vs.

GUSTAV A. SCHNULL et al.

Appealed from the Marion Superior Court.

Come the parties by their Attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by

HARVEY, *C. J.*:

On December 14, 1906, the Railroad Commission of Indiana, after a hearing upon a petition of the present appellees, to which the present appellant was defendant, entered an order fixing rates for shipments of certain classes of freight over appellant's division extending from Indianapolis west to the state line.

Appellant did not appeal from said order to our Appellate Court, as the statute creating the Commission authorized, but declined to comply therewith; and continued to charge appellee and other shippers of said classes of freight over said division rates higher than those specified in said order.

Appellee prosecuted in the Superior Court of Marion County an action for a mandatory injunction against appellant to prevent appellant from charging other than the rates so fixed.

Appellee's complaint was held good; and appellant's second and

third paragraphs of answer held insufficient on demurrers; and from the judgment rendered, after trial, against appellant, this appeal is prosecuted.

In support of its position that the complaint is insufficient, appellant asserts that appellees have no right to maintain this action because it is an effort to enforce an order of the Railroad Commission, whereas the Act creating such Commission (Acts 1905, p. 83) and the amendtatory Act (Acts 1907, p. 454; Burns 5533 et seq.) name a remedy for the enforcement of such orders (Burns 5550);
222 and that an Act creating a new right and a remedy therefor excludes all other remedies.

The rule is well established that when a right is thus created which did not exist at common law, and for that new right a remedy is, by the Act, prescribed, the whole matter of right and remedy is within the Act, and no part of either otherwise exists.

The question we have is whether said rule applies to the situation here presented. If a new right was not created, all discussion of this proposition is ended.

Appellant asserts that the Act of 1905 did not give the Commission any right, power or authority to institute and prosecute any action at law, or suit in equity, or any other proceeding, for the purpose of enforcing obedience to its order; but that obedience to such orders should be secured through the assessment and collection of penalties provided in the Act.

Appellant asserts that this amendment greatly increased and added to the powers, authority and the duties of the Commission; especially giving it authority and power to enforce its orders by actions at law and suits in equity in its own name, in lieu of the provisions of the Act of 1905, and that the authority and power so given the Commission to enforce rate orders is exclusive of all other remedies.

At common law appellees were entitled to both reasonable service and reasonable rates.

Appellees had all remedies at common law and in equity to enforce their said rights.

The statutes under consideration do not create a new right to such service, but something more in the nature of a new remedy for an old right.

223 The General Assembly deemed it best to exercise its undoubted power of regulation and determine in a general and broad way the question as to what rates are reasonable, and for this purpose the legislature created the Commission.

As the creation and empowering of the Commission related to a matter of remedy for existing things which needed a remedy, the rule applies that new remedies are cumulative and never exclusive, unless the Act creating the same so declares expressly, or by clear implication.

Lang vs. Scott, 1 Blackford, p. 405.
Chicago & Indiana Coal Railway Co. vs. Hall, 135 Ind. 91.

That the Commission is empowered to enforce its orders imports, neither expressly nor by implication, that the parties may not use an

order fixing rates as an element of evidence in an effort to enforce an old right.

We find in the Act nothing expressly excluding other remedies, nor do we find any provision so positive as to imply a negative of other remedies.

Chicago, et-. R'y Co. vs. Hall, 135 Ind. 91, op. 104.
Dollar Bank vs. U. S., 19 Wall. 227.
Fletcher vs. State Capital Bank, 37 N. H. 369.

This seems especially pertinent to the present situation; these appellees procured an order, or judgment, of the Commission, as the result of a hearing, or trial, wherein this appellant was defendant, that the identical rates appellees seek to enforce for the identical classes of freight tendered for shipment, over the identical division of appellant's road here involved, are reasonable, and this order is still in force, unless it has expired by operation of law.

This order bound appellant in favor of appellees, particularly, and also in favor of all other like shippers, and is evidence, if not conclusive evidence, against appellant of the matters thus established, available in any action by appellees to enforce appellees' old right.

We further find in the Act itself evidence that it was the
224 intention of the legislature that the remedy created should be exclusive. For instance, section 5, page 88: "In all actions between private parties and railroad companies * * * brought under this law, the rates, charges, orders, rules, regulations and classifications approved or made by said Commission before the institution of such action shall be held, deemed and accepted to be reasonable, fair and just." See also section- 16 and 18.

This suit in equity is justified by reason of the great number of transactions involving small amounts, and the fact that the Commission may also, at law or in equity, enforce its orders, and that the duty of so doing is by statute imposed upon the Commission, does not prevent one entitled to the benefit of an order from instituting an independent action.

We are satisfied no new right was created; an addition was created to the old remedies.

It is next insisted that the complaint is insufficient in that it seeks to enforce an order which had theretofore expired by operation of law.

In State ex rel. Public Service Commission vs. Vandalia Railroad Company, 183 Ind. 49, this court determined that the Act of 1907, which prescribes that "all orders of the Commission * * * shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission" was not retroactive, and therefore did not limit the life of the order here in question, which was entered in December, 1906.

Appellant claims that the portion, above referred to, of said opinion is obiter. The opinion rests upon two distinct grounds, either of
which is sufficient to support the conclusion. In such case
225 if one such element be ignored, in one case, as obiter, the other element may as justly be ignored as obiter when cited in another case involving such element, and the result would be an

opinion all obiter and all ignored except the final order and mandate. That neither element can be ignored is the rule.

Counsel argue that under the Act of 1905 an order fixing rates tied the Commission's hands, exhausted its powers, except as the order might be set aside on appeal, and if affirmed on appeal the order became perpetual, no matter what injustice resulted, and therefore there was a strong inducement to an amendment in 1907 limiting the life of then existing orders, as well as future orders, and that there is good reason for construing the amendment of 1907 as remedial and intended to be retroactive.

This argument overlooks the fact that all such orders are an exercise of the state's public welfare power; and that the state never separates itself from the exercise of this power unless by a clear expression of an intention to do so.

We find no such expression; therefore, the state might, if the facts justify, have made a new order; the Commission might likewise have made a new order. The spirit and life of the state's said power is that circumstances change the public welfare needs, and the spirit of the Commission's powers, unless limited by the Act, is that it may consider such changed conditions and make orders fitting present needs.

We are content to adhere to the decision holding that said Act was not retroactive.

By the demurrer to the second paragraph of answer is presented the question whether it is enough for the defendant railroad company to allege and prove that the rates fixed in said order were
226 at the time of filing the answer, and at the time of trial, confiscatory in that they "will not yield to defendant revenue sufficient to reimburse defendant for its actual cost and outlay in handling and carrying the classes of property specified in said order and provide a fair return to defendant on the value of defendant's property used and employed in handling and carrying the classes of freight described in said order."

It is asserted by appellee that in so far as the facts so alleged are material, they are provable under the general denial, and that the sustaining of this demurrer was harmless, though it be held erroneous. It is asserted by appellant that this answer controverts no allegation of the complaint, in that the complaint simply alleges that the order was entered and is in force; whereas the answer relates to the time the answer was filed and to the future, and is, in effect, an allegation that said rates are then, and will be, confiscatory, though they may not have been confiscatory when the order was entered; and that conditions arising after the complaint was filed are not provable under the general denial.

The cause was tried, and appellant's evidence tends to prove the substance of the answer, as above quoted, and no complaint is made of the exclusion of any offered evidence.

Whether, therefore, our ruling be based on appellant's construction of its answer or upon the evidence heard, we are satisfied that the defendant has not tendered or made a defense, and that the decision of the court is correct. We are led to this conclusion by the following considerations:

Appellees assert that, for all that thus appears, appellant may receive sufficient net income on all its other business on this division,
and on all of its business, including the specified classes, on
227 other divisions, to furnish it a fair return on all its investments
and operations, including the transportation of these classes, and therefore appellant will receive all to which it is entitled, though this order be enforced.

Appellees cites in support of this position the following authorities:

Smythe vs. Ames, 169 U. S. 466.
Minneapolis, etc. Ry. Co. vs. Minnesota, 186 U. S. 257.
Arkansas Rate Case, 187 Fed. 290.
Minnesota Rate Case, 230 U. S. 352.
Missouri Rate Case, 230 U. S. 474.
C., B. & Q. R. R. Co. vs. R. R. Com. of Wisc. 140 N. W. 296.
C. & O. Ry. Co. vs. Public Service Com. 83 S. E. 286.
Commissioners of R. R. vs. Wabash R. R. Co. 126 Mich. 113.
Atlantic Coast, etc. Co. vs. Corporation Co., 206 U. S. 1.
Seaboard Air Line Co. vs. R. R. Com. 206 Fed. 181.
Missouri Pacific Ry. Co. vs. Kansas, 216 U. S. 262.
State vs. C. B. & Q. Ry. Co. 143 S. W. 785.
Reeder's Validity of Rate Regulations, pp. 230-238.

Appellant asserts that the state has no power to thus segregate a certain class of traffic and require the railroad company to carry that traffic at unremunerative rates. Appellant cites:

Northern Pac. Ry. vs. North Dakota, 236 U. S. 580.
Norfolk & Western Ry. Co. vs. Conley, Attorney General, 236 U. S. 605.
Stone vs. Farmers' Loan & Trust Co. 116 U. S. 307-331.
Northern Pac. Ry. Co. vs. North Dakota, 216 U. S. pp. 579-581.
Minnesota Rate Cases, 230 U. S. 352, 433, 434.

There is little or no conflict in the decisions bearing upon these propositions, when principles involved are minded; but there is much confusion growing out of the application of such decisions to other cases. When the decisions cited by both appellant and appellee are read in view of the fundamental principles involved, and in view of the respective rights of the parties to each cause, such confusion almost altogether disappears.

A carrier is entitled to fair remuneration on all its investments
and property. It is entitled to no more. For this it under-
228 takes to reasonably serve in the capacity chosen by it. It undertakes to serve for no less.

If the carrier receives, in the aggregate, such fair remuneration, notwithstanding the rates on a part of its business are not remunerative, the carrier has no basis for complaint.

Atlantic Coast Line vs. North Carolina Corporation Commission, 206 U. S. 1, on. p. 6, and decisions therein cited.

When a rate on a part of the business is too low, some other part of

the carrier's business may be paying too much, thus preventing a deficiency of income which would otherwise result from the non-remunerative rates. In such case the shippers affected by the higher rates may have a basis for complaint..

Smythe vs. Ames, 169 U. S. 466, op. 540, et seq.

If on such shipper's complaint the rates are reduced, and thus the carrier's total net returns caused to be nonremunerative, the carrier may then be entitled to complain and show the facts, and be entitled to an increase of the unfairly low rates;

It does not, however, always follow that because rates on one division are low, rates on other divisions are unduly high. There may be other considerations which justify the low rates, and at the same time justify the other and higher rates.

C., B. & Q. R. R. vs. R. R. Commission, 140 N. W. (Wisc.) p. 296.

The low rates may attract business which, except for the low rates, would go to some other competitive carrier. The low rates thus add an income which would otherwise be absent, though the investment for operation existed. The necessary cost of construction and operation of a particular division may be so excessive that rates
229 remunerative on other divisions are not remunerative as compared with such excessive costs; but are, nevertheless, an advantage for competitive purposes. Railroad companies, in the absence of prohibitive regulation, at times, voluntarily fix low rates for the purposes stated, recognizing that the ultimate result is beneficial to both a carrier and customer. When such is the case the reason is found in considerations and facts beyond the mere comparison of the rates with the investment and cost of operation; in other words, found in consideration of increased business, of adequate service, and the welfare of both carrier and shipper.

As shown in Wood vs. Vandalia Railroad Company, 231 U. S. p. 1, this appellant fixed on some of its divisions lower rates for corresponding distances than those fixed by appellant for the same character of business, on the division here concerned; the higher rates so fixed for this division being reduced by this order. Assuming that the cost of operation and the investment are approximately the same on each division, the difference in rates made by the appellant on the different divisions can not be justified except by rebutting that assumption, or by a showing of other considerations. In other words, difference in necessary investment and facts other than income and investment may be shown, if such facts were the basis of the carrier's voluntary action. The propriety of this view is recognized in Minneapolis Railway Company vs. Minnesota, 186 U. S. 257 op. 267, where the court approving and quoting from Smyth vs. Ames, supra, says:

"It often happens that, to meet competition from other roads at particular points, the companies themselves fix a disproportionately low rate on certain classes of freight consigned to these points."

230 It is upon such breadth of consideration that the court continues such opinion, as follows:

"While we never have decided that the Commission may compel such reductions, we do not think it beyond the power of the State Commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular."

The same line of reasoning permits a carrier to charge more on one division than upon another; but it must allege and prove facts impeaching a Commission's order cutting down the higher rate.

The principle involved is, in our opinion strongly upheld in the decision of the Federal Supreme Court in Wood vs. Vandalia Railroad Company, supra, wherein the Commission's order now in question was involved. In that case the present appellant sued to restrain the Indiana Railroad Commission from enforcing the order here complained of, and upon, substantially, the same allegation as to the insufficiency of the rates that are here made. Upon an appeal by the Commission from the adverse decision of the Circuit Court of the United States, the Supreme Court held that "each case, as pointed out in Smythe vs. Ames, must depend upon its special facts, and the record in the present case is barren of the necessary proof." And further, "for all that appears, the Vandalia Company might enjoy, notwithstanding the enforcement of the rates in question, ample revenue from its intrastate operations to give it a fair return, both from all its lines within the state, and also that operation to which the order referred."

In said decision the lower court was reversed because the record showed that, in testing this particular order, "there was no
231 proof of the value of complainant's property within the State of Indiana, or the return it received from its entire intrastate business, nor was there proof of the value of that portion of its road which was affected by the order, or of the return from all its intrastate business upon that part of its lines."

This, to say the least, is to hold that the hearing is not properly confined to the particular rates and the "actual cost and outlay" in carrying the classes specified on a specified division in ascertaining whether a fair return is provided.

The answer under consideration narrows the issue and omits other elements that should be considered.

As opposed to the above view appellant cited Northern Pacific Railway Co. vs. North Dakota, 236 U. S. 585, which is the latest decision of the United States Supreme Court on this point to which we have been referred, or which we have found. This decision was, as was the decision in the Wood case, supra, written by Justice Hughes, and therefore announces corresponding principles, in so far as the same are involved.

Let it first be observed that the facts in the Dakota case were fully tried. It thus appeared that, all things considered, the state's legislative Act fixing the rate was, as to two carriers of the three involved,

arbitrary; that the state segregated a class of traffic—the handling of lignite coal, which was the state's most extensive natural resource—and by legislative Act the state required the railroads to carry such coal, within the state, at rates which were as to two of the carriers less than the actual out-of-pocket expense involved, and that no compensating consideration or advantage operated in favor of the two carriers.

An effort and design on the part of the state was shown to
232 develop this industry to the exclusive advantage of others than the carriers. The carriers did not obligate themselves to so operate. As shown by the case cited, three roads protested and were required by the State Supreme Court to submit to the rates. Two of them appealed, and the decision of the Federal Supreme Court says: "The same rate was found to be compensatory in the case of the Great Northern, (third road) and this was distinctly shown to be due to the peculiar condition of the traffic." (26 N. D. 439-472-480.)

As to two of the carriers, the presumption of reasonableness was by a full hearing rebutted; as to the other carrier the presumption was not rebutted.

This clearly indicates that all facts and considerations having a bearing are to be heard.

The decision in the Dakota case further reads:

"If in such a case there exists any practice or what may be taken to be (broadly speaking) a standard of rates with respect to that traffic, in the light of which it is insisted that the rate should still be regarded as reasonable" (or in the present case unreasonable) "that should be made to appear."

Legislation fixing rates is presumed to be reasonable, and this presumption holds until all the facts showing the contrary appear, though no hearing was had or permitted before the passage of the legislative Act. A much stronger presumption obtains in favor of the order of a Commission after a trial between the parties actually interested, as was had in this case.

Hence a showing of nothing more than that a rate does not produce a remunerative income upon the investment in the particular property involved in transporting the particular classes over the particular division is not sufficient. The burden is upon the carrier to exclude other facts bearing on the question.

233 St. Louis & San Francisco R'y Co. v. Gill, 156 U. S. p. 649, op. 665, approved in Northern Pacific vs. North Dakota, 236 U. S. op. 600.

The state is restrained by the constitution from arbitrary action by the legislature, or by the agency of the Commission, in fixing such compensation. There is, however, a wide field of discretion in the legislature, or such Commission. One attacking a rate must exclude facts which, if they exist, show the state's action to be reasonable and within this discretion. This the appellant did not do in this case.

Appellee's demurrer was sustained to appellant's third paragraph of answer.

This answer alleges that appellant filed with the Railroad Commis-

sion, in accord with the requirement of the Act of 1907, (p. 454) a schedule of rates covering the same classes of freight and the same points of destination affected by the Commission's order.

Appellant asserts that, as the amendment required such schedule to be filed, and provided that the rates therein named should be lawful rates, the order of the Commission was superseded by the lawful rates named in the schedule.

So far as has been pointed out, there are no decisions upon this exact situation for or against appellant's proposition.

Undoubtedly, had no prior action been taken by the Commission, said Act would apply, and rates fixed in a schedule so filed would govern until changed by the Commission.

But where the matter of rates covered by such schedule has been fully heard and determined by the Commission prior to the filing of such schedule, and especially when the party claiming the benefit of such schedule was a party to the hearing by the Commission,
234 and is bound by the Commission's order, such order is not affected by the ex parte act of filing a schedule of other rates.

The rates fixed in the schedule here filed are not lawful rates while the Commission's order remains in force.

Finding no reversible error in the record, the judgment of the Superior Court is affirmed.

It is therefore considered by the Court that the judgment of the Court below in the above entitled cause be in all things affirmed at the cost of the appellant all of which is to be certified to said Court.

And it is further considered and adjudged by the Court that the Appellee recover of the Appellant, the sum of $—— for their costs in this behalf expended.

And afterwards to wit: On the 16th day of May 1919, being the 149th Judicial Day of the November Term, 1918, of said Supreme Court, the following further pleas and proceedings were had herein:

"Comes now the appellant by Counsel and files in the office of the Clerk of the Supreme Court its petition for the allowance of a writ of error, said petition and the allowance thereof being hereto next below attached, and being as follows:

235 STATE OF INDIANA:

In the Supreme Court.

No. 23204.

VANDALIA RAILROAD COMPANY, Appellant,

vs.

GUSTAV A. SCHNULL et al., Appellees.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of Indiana:

Vandalia Railroad Company, appellant in above entitled cause, respectfully petitions the Court and prays for a writ of error from the

Supreme Court of the United States to the Supreme Court of Indiana, to review the judgment of said Supreme Court of Indiana in the above entitled cause, and for causes thereof alleges:

That said above entitled cause is a suit wherein is drawn in question the validity of a statute of the State of Indiana on the ground of said statute being repugnant to the Constitution of the United States, and the decision of the Supreme Court of Indiana affirming the judgment of the Superior Court of Marion County, Indiana, in this cause, is in favor of the validity of said statute, which is more fully shown by your petitioner's assignment of errors in and for the Supreme Court of the United States, filed herein.

VANDALIA RAILROAD COMPANY,
Appellant,

By D. P. WILLIAMS AND
SAMUEL O. PICKENS,
PICKENS, MOORES, DAVIDSON
& PICKENS,
Its Attorneys.

Allowed, May 16, 1919.
LAWSON M. HARVEY,
Chief Justice.

(Endorsed:) Original. In the Supreme Court of Indiana. No. 23,204. Vandalia Railroad Company, Appellant, vs. Gustav A. Schnull, et al., Appellees. Petition for Writ of Error. Pickens, Moores, Davidson & Pickens, Attorneys for Appellant, 1300 Fletcher Trust Building, Indianapolis. Filed May 16, 1919. Patrick J. Lynch, Clerk.

236 And on the same day the following further pleas and proceedings were had in said Court, in said Cause.

"Comes now the appellant by Counsel and files an assignment of errors in the Supreme Court of the United States, on the writ of error herein, said assignment of errors being hereto next attached and being as follows:

STATE OF INDIANA:

In the Supreme Court.

No. 23204.

VANDALIA RAILROAD COMPANY, Plaintiff in Error,

vs.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN, GEORGE G. GRIFFIN, Composing the Firm of Schnull & Company; Lawrence A. Busby, Charles F. Zies, William Ralph Elliott, Arthur W. Jones, Simon F. Gonter and Joseph S. Gonter, Composing the Firm of S. F. Gonter & Company; Carl C. Nicholas, Daniel W. Davis, Doing Business Under the Name and Style of Davis and Company; Samuel F. Adamson and Claude E. Adamson, Composing the Firm of S. F. Adamson and Son; Absolom Shaffer and William Collier, Composing the Firm of Shaffer and Collier, Defendants in Error.

Assignment of Errors.

Vandalia Railroad Company, plaintiff in error herein, for its Assignment of Errors herein, in the Supreme Court of the United States, says that there is manifest error in the decision and judgment of the Supreme Court of Indiana in the above entitled cause, in the following respects, to-wit:

1. That the Supreme Court of Indiana erred in holding and deciding that the rates specified in the order of the Railroad Commission of Indiana, set forth in the complaint, made and entered on the 14th day of December, 1906, and which order by its terms was to become effective on the first day of February, 1907, were valid and lawful rates, and said order a valid and lawful order, when applied to the facts set up in the second paragraph of answer to the complaint in said cause.

237 2. That the Supreme Court of Indiana erred in holding and deciding that the facts set up in the second paragraph of answer to the complaint in said cause do not state a cause of defense; and in affirming the ruling of the Superior Court of Marion County, Indiana in sustaining the demurrer to said paragraph of answer.

3. That the Supreme Court of Indiana erred in holding and deciding that if a carrier receives in the aggregate a fair remuneration on all of its business, it has no cause to complain of rates prescribed by the order of a state railroad commission on segregated classes of property, which rates are in themselves unremunerative.

4. That the Supreme Court of Indiana erred in holding and deciding that plaintiff in error has no basis for complaint of the order of the Railroad Commission of Indiana, made and entered on the 14th day of December, 1906, and of the rates therein prescribed, for

handling and carrying the classes of property specified in said order, even though such rates will not yield to plaintiff in error revenue sufficient to reimburse it for its actual cost and outlay in and carrying said classes of property and provide a fair return on the value of plaintiff in error's property used and employed in handling and carrying said classes of property, if plaintiff in error derives in the aggregate from all of its intrastate business a fair remuneration on all of its investments and property within the State of Indiana.

5. That the Supreme Court of Indiana erred in holding and deciding that the order of the Railroad Commission of Indiana, made and entered on December 14, 1906, is not in violation and contravention of Section 1 of Article 14 of the Constitution of the United States.

238 That in so deciding and affirming the judgment of the Superior Court of Marion County, Indiana in this suit, the Supreme Court of Indiana, by its said decision herein, decided in favor of the validity of the order of the Railroad Commission of Indiana made and entered on December 14, 1906, the validity of which is herein drawn in question on the ground of said order being repugnant to the Constitution of the United States.

VANDALIA RAILROAD COMPANY,
Plaintiff in Error,

By D. P. WILLIAMS,
SAMUEL O. PICKENS,
PICKENS, MOORES, DAVIDSON & PICKENS,
Its Counsel.

(Endorsed:) Original. In the Supreme Court of Indiana. No. 23204. Vandalia Railroad Company, Plaintiff in Error vs. Gustav A. Schnull, et al. Defendants in Error. Assignment of Errors. Pickens, Moores, Davidson & Pickens, Attorneys for Plaintiff in Error. 1300 Fletcher Trust Building. Indianapolis. Filed May 16, 1919, Patrick J. Lynch.

And on the same day, the following further pleas and proceedings were had in said court in said cause.

"Comes now the appellant by Counsel and files its bond on writ of error from the Supreme Court of the United States in the penal sum of One Thousand Dollars (1,000.00) which bond is now taken and approved by Honorable Lawson M. Harvey, Chief Justice, a copy being hereto next below attached, and being as follows:

239 *Bond.*

Know all men by these presents, that we, Vandalia Railroad Company, as principal and The Guarantee Company of North America, a corporation organized and existing under the laws of the State of New York, as Surety, are held and firmly bound unto Gustav A.

Schnull, William J. Griffin, George G. Griffin, Composing the Firm of Schnull and Company, Lawrence A. Busby, Charles F. Zies, William Ralph Elliott, Arthur W. Jones, Simon F. Gonter, and Joseph S. Gonter, composing the Firm of S. F. Gonter and Company, Carl C. Nicholas, Daniel W. Davis, doing business under the name and style of Davis and Company, Samuel F. Adamson and Claude E. Adamson, composing the Firm of S. F. Adamson and Son, Absolom Shaffer and William Collier, composing the firm of Shaffer & Collier, in the penal sum of One Thousand Dollars ($1,000.00), for the payment of which, well and truly to be made and done, said Vandalia Railroad Company, as such Principal, and said The Guarantee Company of North America, as such Surety, bind themselves, their respective successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of May, 1919.

Whereas, lately, to-wit: On February 21, 1919, at a term of the Supreme Court of Indiana, in a suit pending in said court between Vandalia Railroad Company as Appellant and the said Gustav A. Schnull, William J. Griffin, George G. Griffin, composing the firm of Schnull and Company, Lawrence A. Busby, Charles F. Zies, William Ralph Elliott, Arthur W. Jones, Simon F. Gonter and Joseph S. Gonter, composing the firm of S. F. Gonter and Company, Carl C. Nicholas, Daniel W. Davis, doing business under the name and style of Davis and Company, Samuel F. Adamson and Claude E. Adamson, composing the firm of S. F. Adamson and Son, Absolom Shaffer and William Collier, composing the firm of Shaffer and Collier, as Appellees, a judgment was rendered against said
240 Appellant, affirming a judgment and decree of the Superior Court of Marion County, Indiana, in favor of said Appellees and against said Appellant, enjoining said Vandalia Railroad Company from charging, collecting or receiving from said Appellees or any other person or persons standing in the like situation as do the Appellees in said cause, for the handling and transportation of freights in the various classes of classified freights prescribed in the order of the Railroad Commission of Indiana made and entered by said Railroad Commission on the 14th day of December, 1906, to become effective on the 1st day of February, 1907, rates in excess of the rates prescribed in said order; and said Vandalia Railroad Company having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of said Supreme Court of Indiana, to reverse the judgment of said Supreme Court in said suit, and a citation, directed to said Appellees, citing and admonishing them to be and appear in the Supreme Court of the United States, at Washington, D. C., within thirty days from the date thereof;

Now, the condition of the above obligation is such that if said Vandalia Railroad Company shall prosecute said Writ of Error to

effect, and answer all damages and costs if it fail to make its plea good, then the above obliga- to be void; else to remain in full force and virtue.

VANDALIA RAILROAD COMPANY,
By D. P. WILLIAMS,
Its Agent and Attorney.
[SEAL.] THE GUARANTEE COMPANY OF NORTH AMERICA,
By JACOB S. WHITE,
Atty. in Fact.
RICHARD M. HENNESSEY, JR.,
Atty. in Fact.

Approved, the 16th day of May, 1919.
LAWSON M. HARVEY,
Chief Justice of the Supreme Court of Indiana.

241 (Endorsed:) In the Supreme Court of Indiana. No. 23204. Vandalia Railroad Company, Appellant, vs. Gustav. A. Schnull, et al., Appellees. Bond on Writ of Error. Filed May 16, 1919. Patrick J. Lynch, Clerk.

And on the same day the following further pleas and proceedings were had in said Court in said cause.

"Comes now the appellant by Counsel and files a writ of error from the Supreme Court of the United States to the said Supreme Court of Indiana in this cause, allowed by Hon. Lawson M. Harvey, Chief Justice of said Supreme Court, said writ of error and the allowance thereof being hereto next below attached, and being as follows:

242 UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Judges of the Supreme Court of Indiana, Greeting:

Because in the record and proceedings, as also on the rendition of the judgment of a plea which is in the said Supreme Court, before you, between Vandalia Railroad Company and Gustav A. Schnull, William J. Griffin, George C. Griffin, composing the firm of Schnull & Company; Lawrence A. Busby, Charles F. Zies, William Ralph Elliott, Arthur W. Jones, Simon F. Gonter and Joseph S. Gonter, composing the firm of S. F. Gonter & Company; Carl C. Nicholas, Daniel W. Davis, doing business under the name and style of Davis and Company; Samuel F. Adamson and Claude E. Adamson, composing the firm of S. F. Adamson and Son; Absolom Shaffer and William Collier, composing the firm of Shaffer and Collier: a manifest error hath happened, to the great damage of the said Vandalia Railroad Company, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and pro-

ceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of said District Court, this 16th day of May, A. D. 1919.

[Seal District Court of the United States, District of Indiana.]

WM. C. MILLER,
Clerk of the District Court of the United States for the District of Indiana.

Allowed May 16, 1919.

LAWSON M. HARVEY,
Chief Justice.

Copy of above writ for the defendant in error lodged in the Clerk's Office of the Supreme Court of Indiana, on the 16th day of May, 1919.

In obedience to the above writ I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the above entitled cause, this 4th day of June, A. D. 1919.

PATRICK J. LYNCH,
Clerk of the Supreme Court of Indiana.

[Endorsed:] Original. No. 23,204. Supreme Court of Indiana. Vandalia Railroad Company, Plaintiff in Error, vs. Gustav A. Schnull et al, Defendant in Error. Writ of Error to the Supreme Court of the United States. Filed May 16, 1919. Patrick J. Lynch, Clerk.

243 And afterwards to wit: On the 20th day of May, 1919, being the 152nd Judicial Day of the November Term, 1918, of said Supreme Court, the following further pleas and proceedings were had herein:

"Comes now the appellant, by Counsel, and files its citation on said writ of error, duly signed by Honorable Lawson M. Harvey, Chief Justice of said Supreme Court, and proof of service of the citation on the defendant in error, said citation and proof of service thereof being hereto next below attached, and being as follows:

244 UNITED STATES OF AMERICA, *ss:*

To Gustav A. Schnull, William J. Griffin, George G. Griffin, composing the firm of Schnull & Company; Lawrence A. Busby, Charles F. Zies, William Ralph Elliott, Arthur W. Jones, Simon F. Gonter and Joseph S. Gonter, composing the firm of S. F. Gonter & Company; Carl C. Nicholas, Daniel W. Davis, doing business under the name and style of Davis and Company; Samuel F. Adamson and Claude E. Adamson, composing the firm of S. F. Adamson and Son; Absolom Shaffer and William Collier, composing the firm of Shaffer and Collier:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to Writ of Error filed in the Clerk's Office of the Supreme Court of the United States, wherein Vandalia Railroad Company is Plaintiff in Error and you are Defendants in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Lawson M. Harvey, Chief Justice of the Supreme Court of Indiana, this 17th day of May, in the Year of Our Lord One Thousand Nine Hundred and Nineteen.

LAWSON M. HARVEY,
Chief Justice of the Supreme Court of Indiana.

245 We, Smith, Remster, Hornbeck & Smith, Attorneys for the Defendants in Error in the Writ of Error referred to in the foregoing Citation and named in said Citation, hereby acknowledge service of the foregoing Citation by receipt of a copy thereof, on this the 19th day of May, 1919.

SMITH, REMSTER, HORNBROOK & SMITH,
Attorneys for Said Defendants in Error.

246 [Endorsed:] Original. In the Supreme Court of Indiana. No. 23204. Vandalia Railroad Company, Appellant, v. Gustav A. Schnull, et al., Appellees. Citation. Filed May 20, 1919. Patrick J. Lynch, Clerk. Pickens, Moores, Davidson, & Pickens, Attorneys for Appellant, 1300 Fletcher Trust Building, Indianapolis.

247 And on the same day, the following further pleas and proceedings were had in said Court in said cause.

"Comes now the appellant by counsel and files its praecipe for transcript of record, a copy being hereto next below attached and being as follows.

STATE OF INDIANA:

In the Supreme Court.

No. 23204.

VANDALIA RAILROAD COMPANY, Appellant,
vs.
GUSTAV A. SCHNULL et al., Appellees.

Præcipe for Transcript of Record.

Hon. Patrick J. Lynch, Clerk of the Supreme Court of Indiana:

In making return of the Writ of Error in the above entitled cause and the Transcript of the Record, please incorporate in such transcript only the following portions of the record:

1. All of the transcript on appeal from the Superior Court of Marion County, Indiana to the Supreme Court of Indiana.

2. The Assignment of Errors in the Supreme Court of Indiana, set forth on the transcript from said Superior Court of Marion County, Indiana.

3. All of the record of the proceedings in the Supreme Court of Indiana, except appellant's motion for a further suspension of the operation of the decree and injunction, and the order of said court thereon, and except all briefs and arguments of counsel.

4. The opinion and decision of the Supreme Court of Indiana.

248 5. The petition for writ of error, the assignment of errors filed therewith, the original writ of error, the supersedeas bond on the writ of error, and the original citation and acknowledgment of service thereof.

6. This præcipe.

The transcript should include all endorsements on all documents filed.

VANDALIA RAILROAD COMPANY,
Appellant,

By D. P. WILLIAMS,
PICKENS, MOORES, DAVIDSON & PICKENS,
Its Attorneys.

We, as attorneys for the appellees in the above entitled cause, hereby acknowledge service of the foregoing præcipe by receiving a copy thereof, this 20th day of May, 1919.

SMITH, REMSTER, HORNBROOK & SMITH,
Attorneys for Appellees.

(Endorsed:) In the Supreme Court of Indiana. No. 23204. Vandalia Railroad Company, Appellant, vs. Gustave A. Schnull, et al., Appellees. Præcipe for Transcript of Record. Filed May 20, 1919, Patrick J. Lynch, Clerk. Pickens, Moores, Davidson & Pickens, Attorneys for Appellant. 1300 Fletcher Trust Building, Indianapolis.

249 STATE OF INDIANA:

In the Supreme Court.

I, Patrick J. Lynch, Clerk of the Supreme Court of the State of Indiana, hereby certify the above and foregoing to be a full, true, and complete transcript of the record of the proceedings had, papers filed, rulings made, opinions delivered, judgments rendered, orders and decrees entered in said Supreme Court in Cause No. 23204, wherein Vandalia Railroad Company is Appellant, and Gustav A. Schnull, et al., are Appellees, and of the petition for the allowance of the writ of error, the allowance thereof, the bond on writ of error and its approval by the Chief Justice of said Supreme Court of Indiana, the assignment of errors in the Supreme Court of the United States; and I attach to such transcript the original writ of error from the Supreme Court of the United States to the Supreme Court of Indiana, and the allowance thereof, and the original citation to the defendants in error, and the acknowledgment of service thereof in compliance with the foregoing præcipe, which said transcript, together with the original writ of error and the original citation, is hereby certified as and for my full return to said writ of error.

In witness whereof, I hereunto set my hand and affix the seal of said Supreme Court of Indiana at the City of Indianapolis, this 4th day of June, 1919.

[Seal Supreme Court, State of Indiana.]

PATRICK J. LYNCH,
Clerk Supreme Court of Indiana.

Endorsed on cover: File No. 27,163. Indiana Supreme Court. Term No. 408. Vandalia Railroad Company, plaintiff in error, vs. Gustav A. Schnull, William J. Griffin and George C. Griffin, composing the firm of Schnull & Company, et al. Filed June 9th, 1919. File No. 27,163.

FILE COPY

Office Supreme Court, U. S.
FILED
NOV 6 1920
CLERK.

(No. 27163.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 125.

VANDALIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN, AND GEORGE G. GRIFFIN, COMPOSING THE FIRM OF SCHNULL & COMPANY, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR PLAINTIFF IN ERROR.

SAMUEL O. PICKENS,
Attorney of Record for Plaintiff in Error.
FREDERIC D. McKENNEY,
D. P. WILLIAMS,
CHARLES W. MOORES,
R. F. DAVIDSON,
OWEN PICKENS,
Of Counsel for Plaintiff in Error.

(No. 27163.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 125.

VANDALIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN, AND GEORGE G. GRIFFIN, COMPOSING THE FIRM OF SCHNULL & COMPANY, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Defendants in error brought this suit in the Superior Court of Marion County, Indiana, against plaintiff in error, for a mandatory injunction to prevent plaintiff in error from charging any rates for the handling and transportation of certain

classes of property, designated as first, second, third, fourth, fifth and sixth classes, over its line of railroad between Indianapolis, Indiana, and the Indiana-Illinois state line, and between intermediate stations, in excess of the rates fixed by the order of the Railroad Commission of Indiana entered on December 14, 1906, effective February 1, 1907, upon the petition of the defendants in error, to which plaintiff in error was respondent. (The order is at pp. 46-47 of Record.)

In the Superior Court the defendant (plaintiff in error) answered the complaint by a general denial and by a second paragraph as follows:

"Paragraph 2. For a further and second paragraph of answer to plaintiffs' complaint, Vandalia Railroad Company, defendant herein, says:

That the rates specified in the order mentioned in said complaint and which was made and entered by the Railroad Commission of Indiana on the fourteenth (14th) day of December, 1906, and which by its terms was to become effective on the first (1st) day of February, 1907, will not yield to defendant revenue sufficient to reimburse defendant for its actual cost and outlay in handling and carrying the classes of property specified in said order of said Railroad Commission, and provide a fair return to defendant on the value of defendant's property used and employed in handling and carrying the classes of property in said order specified.

And defendant further says that under Section 1 of Article 14 of the Constitution of the United States defendant cannot be lawfully deprived of its property without due process of law, nor be deprived of the equal protection of the laws; and that if the rates specified in said order of the Railroad Commission

of Indiana be enforced defendant will be compelled to handle and carry said classes of property in said order specified without deriving or receiving therefrom revenue sufficient to pay the actual cost to defendant of handling and carrying said classes of property and provide a fair return to defendant on the value of defendants property used and employed in handling and carrying said classes of property, and defendant will thereby be deprived of its property without due process of law, in violation and contravention of said Section 1 of Article 14 of the Constitution of the United States.

Wherefore, defendant says that the rates specified in said order of said Railroad Commission of Indiana, and likewise said order, are illegal and void, and prays to be hence dismissed and that it have judgment herein against plaintiffs for all its costs and charges herein laid out and expended."

The plaintiff demurred to this paragraph of answer, on the statutory ground that it does not state facts sufficient to constitute a cause of defense to the cause of action set forth in the complaint, which was sustained by the Superior Court, to which ruling the defendant excepted. Upon the trial in the Superior Court judgment was rendered against the defendant, granting the injunction as prayed for in the complaint. From this judgment plaintiff in error appealed to the State Supreme Court, where the judgment of the Superior Court was affirmed.

(The court's opinion is in the record at pp. 104-112; 122 N. E. Rep. 225.)

The question involved, is this: If the rates fixed by the order of the Commission in question will not produce revenue sufficient to reimburse the carrier for the actual cost and outlay in handling and carrying the classes of property specified

in the order and provide a fair return to the carrier on the value of its property used and employed in performing the service, is the order constitutional and valid?

Plaintiff in error contends that it is unconstitutional and void because the carrier cannot lawfully be required to carry this segregated traffic without remuneration for that service, regardless of what its revenue may be from the carrying of other traffic.

Defendants in error contend, as we understand their position, that if the carrier receives from carrying and handling all its intrastate traffic, for the carrying of which the rates are established by orders of the state commission, including the carrying of the classes of property specified in the order in question, revenue sufficient to remunerate the carrier for the carrying and handling of all such traffic, then said order is valid, notwithstanding that the rates fixed in the order may not produce revenue sufficient to compensate the carrier for performing the service in carrying and handling the traffic specified in the order.

This question is raised by the ruling of the Superior Court in sustaining the demurrer to plaintiff in error's second paragraph of answer to the complaint and the affirmance of that ruling by the judgment of the State Supreme Court.

In the State Supreme Court the defendants in error urged the further point that the second paragraph of answer was not sufficient to withstand the demurrer because the allegation that the rates were confiscatory related to the time of the filing of the answer, without any allegation that such rates were confiscatory at the time of the filing of the complaint, which, as they contend, is a tacit concession that at the time of the bringing of the suit the rates were compensatory, and since which time they have become confiscatory. It seems to us clear that

there is no merit in this point, and we do not believe that counsel will urge it here. Indeed, in their brief in the State Supreme Court they said: "The question is not of any serious consequence; but we submit that the answer in these terms was not a full answer to the complaint."

THE ERRORS RELIED UPON.

The errors relied upon and intended to be urged by plaintiff in error are as follows:

1. That the Supreme Court of Indiana erred in holding and deciding that the rates specified in the order of the Railroad Commission of Indiana, set forth in the complaint, were valid and lawful rates, and said order a valid and lawful order, when applied to the facts set up in the second paragraph of answer to the complaint.

2. That the Supreme Court of Indiana erred in holding and deciding that the facts set up in the second paragraph of answer to the complaint do not state a cause of defense; and in affirming the ruling of the Superior Court in sustaining the demurrer to said paragraph of answer.

3. That the Supreme Court of Indiana erred in holding and deciding that if a carrier receives in the aggregate a fair remuneration on all of its business, it has no cause to complain of rates prescribed by the order of the State Railroad Commission on segregated classes of property, which rates are in themselves unremunerative.

4. That the Supreme Court of Indiana erred in holding and deciding that plaintiff in error has no basis for complaint of the order of the Railroad Commission of Indiana made and entered on the 14th day of December, 1906, and of the rates therein prescribed for handling and carrying the classes of property speci-

fied in said order, even though such rates would not yield to plaintiff in error revenue sufficient to reimburse it for its actual cost and outlay in carrying said classes of property and provide a fair return on the value of plaintiff in error's property used and employed in handling and carrying said classes of property, if the plaintiff in error derives in the aggregate, from all of its intrastate business, a fair remuneration on all of its investments and property within the State of Indiana.

5. That the Supreme Court of Indiana erred in holding and deciding that the order of the Railroad Commission of Indiana, made and entered on December 14, 1908, was not in violation and contravention of Section 1 of Article XIV of the Constitution of the United States.

BRIEF OF THE ARGUMENT.

The schedule of rates fixed by the Railroad Commission's order are approximately 34 per cent less than the rates which plaintiff in error was charging at the time the order was entered for the carrying and handling of the classes of property specified in the order.

Plaintiff in error alleges in its answer to the complaint that the rates established by the order are confiscatory. The demurrer to this answer admits the facts alleged as to the confiscatory character of the rates. The State Supreme Court by its decision holds that even though these rates are confiscatory plaintiff in error has no cause to complain if it receives in the aggregate a fair remuneration on all of its Indiana business.

We cannot believe that it is essential to a complete and valid defense to such a suit as we have here that the carrier must allege and prove that its revenue derived from all of its intrastate traffic, or from all of such traffic for the carrying of which the rates are fixed by orders of the state commission, is insufficient to pay the cost of carrying such traffic and leave a sufficient sum to give it a fair return upon the value of its property used in carrying all of such traffic. We maintain that in such a case it is a sufficient defense for the company to allege and prove that the rates fixed by the state commission's order for the carrying and handling of the segregated traffic are in and of themselves confiscatory. That is, that the revenue received from the carrying and handling of that traffic will not yield revenue sufficient to pay the cost of *that* service and leave to the carrier a sum sufficient to give it a fair return upon its property used and employed in such service. In other words, we contend that the State has no power to segregate a certain class of railroad traffic and require the carrier to carry and handle

that traffic at unremunerative rates. Since the carrier is entitled to receive a fair return upon the value of all of its property used for the benefit of the public, to hold that a carrier may be required to carry a part of its traffic at a loss would mean that that loss must be made good by rates imposed upon other parts of its traffic.

In *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, the court, in discussing a similar question, said this: "It does not aid the argument to urge that the State may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action." (P. 598.)

It would be neither fair nor just to require shippers of one class of property to pay more than a just and reasonable rate in order to make good a loss sustained by the carrier on traffic required to be carried at less than cost. The contrary doctrine would be repugnant to the constitutional safeguards for the protection of property.

The offense against these constitutional guaranties is just as clear and pronounced, we submit, in a case where the carrier is by the State required to use a part of its property in carrying a part of its traffic without remuneration as in a case where the carrier is required to use all of its property in carrying all of its traffic without remuneration. A man has the same constitutional protection against the taking by the State of an acre of his land without due process of law and without just compensation as he has against the taking of his entire farm. It will not do to say in answer to this that because a railroad company is a corporation serving the public and therefore sub-

ject to regulation by the State of its duties and obligations it cannot claim the protection of these constitutional safeguards as can the individual man. For while the corporation's duties and obligations in serving the public are subject to regulation, it holds its property under the same constitutional protection as does the individual. Corporations are persons, within the meaning of the Fourteenth Amendment, guaranteeing all persons due process of law and the equal protection of the laws. *Southern Ry. Co. v. Greene*, 216 U. S. 400.

To deprive of the use of property is to deprive of the property itself.

We believe that the question involved in this record is settled in favor of our contention by the decision in the North Dakota case above cited.

The legislature of North Dakota fixed maximum intrastate rates, graduated according to distance, for the transportation of coal in carload lots. While those rates governed all intrastate coal shipments, their practical application was almost solely to lignite coal. The carriers refused to put the rates into effect, and the Attorney-General of the State brought proceedings in the State Supreme Court and obtained a mandatory injunction against the Northern Pacific, and other Railway Companies. The companies answered, among other things, that the statute infringed the Fourteenth Amendment by fixing rates that were unremunerative, unreasonable and confiscatory. The Supreme Court of the state overruled this contention and granted the injunction. When the case reached this court on writ of error, the decree of the state court was affirmed without prejudice to the right of the railroad companies to reopen the case after an adequate trial of the rates. (216 U. S. 579.)

After the case was remanded to the state court it was reopened, voluminous testimony was taken, and the state court,

making its separate findings of fact as to the effect of the rates in the intrastate business of each carrier, and stating its conclusion of law, entered judgment commanding the carriers to keep the rates in force. The case again reached this Court on writs of error sued out by the Northern Pacific Company and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. This Court reversed the decree, holding that the State exceeded its authority in enacting the statute, which amounted to an attempt to take the property of the carriers without due process of law, in violation of the Fourteenth Amendment.

In course of the opinion the Court said:

"The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain." (P. 595.)

Again:

"Frequently, attacks upon state rates have raised the question as to the profitableness of the entire intrastate business under the state's requirements. But the decisions in this class of cases (which we have cited in the margin) furnish no ground for saying that the State may set apart a commodity or a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate." (P. 599.)

And again:

"It has repeatedly been assumed in the decisions of this Court, that the State has no arbitrary power over the carrier's rates and may not select a particular commodity or class of traffic for carriage without reasonable reward." (P. 601.)

In concluding the opinion the Court said:

"To repeat and conclude: It is presumed,—but the presumption is a rebuttable one—that the rates which the State fixes for intrastate traffic are reasonable and just. When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business and show that it has been denied a fair return upon that value. With respect to particular rates, it is recognized that there is a wide field of legislative discretion, permitting variety and classification, and hence the mere details of what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial compensation, are not subject to judicial review. But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service, after taking into account the entire traffic to which the rate applies, it must be concluded that the State has exceeded its authority." (P. 604.)

On the same day that the North Dakota case was decided, the Court handed down its opinion in *Norfolk & Western Railway Company v. Conley, Attorney-General*, 236 U. S. 605, in which it is held, following the decision of the North Dakota case, that while the State has a broad field for the exercise of its power in fixing intrastate rates of common carriers, it may not require the carriers to carry passengers at a rate which affords such a narrow, if any, margin over the cost of the traffic that it is forced to carry, if not at or below cost, with merely a nominal reward.

The latest case bearing upon this question is *Brooks-Scanlon Company v. Railroad Commission of Louisiana*, decided February 2, 1920, 40 Supreme Court Reporter, p. 183, citing the North Dakota and Norfolk & Western cases above referred to, which we think supports our contention.

As to the point urged by the defendants in error in the State Supreme Court, that the second paragraph of answer was not a full answer because it was not alleged that the rates were confiscatory at the time of the filing of the complaint, we submit that the question is not whether the rates were confiscatory at the time the complaint was filed, but at the time the Court should be called upon to consider the evidence and decide the case.

It would not be a defense to show that the rates were confiscatory at the time the suit was brought, for whatever the facts were proved to be at that time the court would not be justified in holding that the defendant had established its defense of the confiscatory character of the rates unless it were further proved that at the time of the hearing of the case the rates were then confiscatory. The rates might have been fully remunerative at the time the suit was brought and wholly unremunerative, owing to changed conditions, at the time the court should be called upon to render its decision; or, on the other hand, the rates might have been unremunerative at the time the suit was brought, and amply remunerative at the time the case was submitted to the court for decision. Hence it must necessarily be that the question to be determined in such a case, as to the remunerative or unremunerative character of the rates, must be determined as of the date when the evidence is heard and the cause submitted for decision.

The following cases seem to settle this question against the contention of defendants in error; *Wilcox v. Consolidated Gas*

Co., 212 U. S. 19, 52; *Northern Pacific Ry. Co. v. North Dakota*, 216 U. S. 579, 581; *Norfolk & Western Ry Co. v. Conley, Attorney-General*, 236 U. S. 605; Minnesota Rate Cases, 230 U. S. 352; Missouri Rate Cases, 230 U. S. 474.

Respectfully submitted,

SAMUEL O. PICKENS,

Attorney of Record for Plaintiff in Error.

FREDERIC D. McKENNEY,

D. P. WILLIAMS,

CHARLES W. MOORES,

R. F. DAVIDSON,

OWEN PICKENS,

Of Counsel for Plaintiff in Error.

FREE COPY

Office Supreme Court
FILED
JAN 3 1921
JAMES D. MAHER
CLERK

(No. 27163)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 125.

VANDALIA RAILROAD COMPANY, Plaintiff in Error,

vs.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN, and GEORGE G. GRIFFIN, Composing the Firm of SCHNULL & COMPANY, ET AL., Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR IN REPLY TO SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

SAMUEL O. PICKENS,
D. P. WILLIAMS,
Attorneys of Record for Plaintiff in Error.

FREDERIC D. McKENNEY,
CHARLES W. MOORES,
R. F. DAVIDSON,
OWEN PICKENS,
Of Counsel for Plaintiff in Error.

James McMillin Printing Company, Penn Ave. and Barbeau St., Pittsburgh, Pa.

(No. 27163)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 125.

VANDALIA RAILROAD COMPANY, Plaintiff in Error,

vs.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN, and GEORGE G. GRIFFIN, Composing the Firm of SCHNULL & COMPANY, ET AL., Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

Supplemental Brief for Plaintiff in Error in Reply to Supplemental Brief for Defendants in Error.

The statement of the case contained in the original brief for Plaintiff in Error fully sets forth the nature of the suit and the pleadings necessary to present the federal question involved, and counsel for Defendants

in Error, on page 1 of the original brief for Defendants in Error, concedes the correctness of the statement of the case in the brief for Plaintiff in Error.

The statement of the case set forth in the supplemental brief for Defendants in Error adds nothing to the statement of the case contained in the brief for Plaintiff in Error. The statement of the case contained in the supplemental brief for Defendants in Error does, however, contain some inaccuracies, most of which are of little importance and have no bearing upon the federal question presented by the record, except the statement appearing on page 4 of such supplemental brief in connection with the attempt of counsel for Defendants in Error to state the effect of the assignments of error in this court, and which statement, in part, reads:

> "(2) That the Supreme Court of Indiana erred in holding upon the record that these rates had not been shown to be confiscatory."

The confiscatory character of the rates prescribed in the order of the Railroad Commission of Indiana dated December 14, 1916, was not in issue on the trial of this cause in the Superior Court of Marion County for the reason that the second paragraph of the answer of Plaintiff in Error which tendered this issue by specially pleading it was demurred to by Defendants in Error for want of sufficient facts to constitute a defense, and this demurrer was sustained.

The assignments of error in this court appear in the printed record on pages 114 and 115 and are directed entirely to the errors committed by the Supreme Court of Indiana in upholding the ruling of the Superior

Court of Marion County, Indiana, in sustaining the demurrer of the Defendants in Error to the second paragraph of answer of Plaintiff in Error by which ruling the Plaintiff in Error, on the trial in the Marion Superior Court, was denied the right and opportunity to introduce evidence to show that the rates prescribed in the order under attack were confiscatory, and no such evidence, of course, was introduced by Plaintiff in Error on the trial in the Marion Superior Court.

The second paragraph of answer of Plaintiff in Error is correctly copied on pages 4 and 5 of the supplemental brief for Defendants in Error and appears also on pages 12 and 13 of the printed record.

The demurrer to this second paragraph of answer, for want of sufficient facts to constitute a defense to the cause of action set forth in the complaint of Defendants in Error, appears on pages 17 and 18 of the printed record, and the ruling of the Superior Court of Marion County sustaining such demurrer together with Plaintiff in Error's exception thereto, appears on page 18 of the printed record, and the opinion of the Supreme Court of the State of Indiana appears on pages 104 to 112, both pages included, of the printed record, and that portion of such opinion dealing with the questions arising on the ruling of the Superior Court of Marion County sustaining such demurrer appears in the printed record beginning at the middle of page 107 and ending at the bottom of page 111.

Brief of the Argument.

I.

In the supplemental brief for Defendants in Error two reasons in addition to the reasons set forth in the original brief for Defendants in Error are urged in support of the decision of the Supreme Court of Indiana sustaining the demurrer to the second paragraph of answer. These additional reasons are:

> "(b) The paragraph is insufficient for the further reason that it states no issue of fact but the mere conclusion of the pleader as to a material fact.
>
> (c) The paragraph is demurrable under the laws of Indiana because it states no defense under those laws."

The first of these reasons was urged in the Supreme Court of Indiana but that court, apparently, did not consider the reasons of sufficient importance to discuss it or pass upon it in its decision and opinion.

This paragraph of answer clearly pleads an ultimate and issuable fact and not a mere conclusion.

Bliss on Code Pleading, Sections 140, 206, 207, 208, 209;
Voiles vs. Beard, 58 Indiana, 510;
Board of Commissioners vs. Hill, 115 Indiana, 316.

If the second paragraph of Plaintiff in Error's answer could possibly be so construed as to plead a conclusion or conclusions instead of issuable facts, that

objection could not be taken by demurrer, under the practice in the State of Indiana, but could only be reached in the trial court by a motion to require the pleader to state the facts necessary to sustain the conclusion alleged. If no such motion be made, all objections to the pleading, on the ground that it states conclusions, are waived. (Acts 1915, Indiana, Chapter 62, page 123.)

In support of the second additional reason to uphold the ruling on the demurrer to the second paragraph of answer, counsel for Defendants in Error quotes in full section 6 of the first and original act creating the Railroad Commission of the State of Indiana, which became effective April 15, 1905. (Acts 1905, Indiana, page 83.)

This section 6 was subsequently, in effect, entirely repealed by the amendment contained in the act in force April 10, 1907. (Acts 1907, Indiana, page 454.)

The point made by counsel for Defendants in Error is that this section specified the routine that was to be followed by the railroad company if it wished to raise the question of the confiscatory nature of the rates specified in the order of December 14, 1906; that such routine was the only routine permitted under the laws of Indiana to raise such question and that there is nothing in the Railroad Commission Act of Indiana permitting a railroad company against which an order has been entered to raise the question of confiscation as a special defense in a suit brought to enforce the application of the rates prescribed in such order.

The further point is made in the supplemental brief for Defendants in Error that, by virtue of the amendment of section 6 of the Act of 1905, by the Act of 1907,

Plaintiff in Error was barred from raising the defense pleaded in paragraph two of its answer after ninety days from February 1, 1907, or, after thirty days from November 18, 1913, and, therefore, such defense was barred on December 13, 1915, the date the answer was filed in the Superior Court of Marion County, Indiana.

The mere statement of these extraordinary propositions contained in the supplemental brief for Defendants in Error would seem to be sufficient to refute them.

It is inconceivable that any lawyer would seriously assert that a state can by legislative enactment deprive any person of the right to claim the protection afforded under the Constitution of the United States.

The second paragraph of Plaintiff in Error's answer asserts a right guaranteed to Plaintiff in Error by section 1 of article 14 of the Constitution of the United States namely, that Plaintiff in Error cannot be deprived of its property without due process of law.

The legislature of the State of Indiana in enacting the Railroad Commission Act of 1905 and the amendatory Act of 1907 could not, even had it desired to do so, deprive the Plaintiff in Error or any other person of the right to claim the protection afforded by section 1 of article 14 of the Constitution of the United States, and, as a matter of fact, the legislature of Indiana in enacting the two acts referred to never intended to attempt to do such a vain thing.

II.

Counsel for Defendants in Error is mistaken in his belief that this case is before this court for alleged error

committed by the Supreme Court of Indiana in interpreting rules of pleading in that state.

No question of any kind was ever raised in the Supreme Court of Indiana with respect to interpreting any of the rules of pleading or practice in the courts of that state, and no such question is presented by the assignments of error in this court.

The error of the Supreme Court of Indiana of which complaint is made is the error in misconstruing the law of the land by virtue of which Plaintiff in Error has been deprived of a right guaranteed to it by the Constitution of the United States.

III.

Counsel for Defendants in Error is also mistaken in believing that the sustaining of the demurrer to second paragraph of answer did not affect adversely the Plaintiff in Error in its case on the general denial.

The present practice act of the State of Indiana has been in force since September 19, 1881. (Acts 1881, Indiana, page 240.)

Section 92 of this Act reads as follows:

"92. The answer shall contain—

FIRST. A denial of each allegation of the complaint controverted by the defendant.

SECOND. A statement of any new matter constituting a defense, counterclaim, or set-off, in plain and concise language.

THIRD. The defendant may set forth in his answer as many grounds of defense, counter-claim,

and set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered, and clearly refer to the cause of action intended to be answered."

Section 102 of the same Act reads as follows:

"102. All defenses, except the mere denial of the facts alleged by the plaintiff, shall be pleaded specially."

Section 127 of the same Act reads as follows:

"127. Under a mere denial of any allegation, no evidence shall be introduced which does not tend to negative what the party making the allegation is bound to prove."

The complaint in this case proceeds upon the theory that the Railroad Commission of Indiana made a valid order prescribing certain rates and directing the Plaintiff in Error to apply such rates to the particular class of traffic over the particular and limited portion of Plaintiff in Error's railroad specified and described in such order; that the Plaintiff in Error had refused to obey such order and that Defendants in Error, plaintiffs below, were thereby damaged in such manner and to such an extent that they had no adequate remedy at law, and they, therefore, prayed an injunction, mandatory in form, commanding and requiring Plaintiff in Error to obey the order of the Commission.

The issue presented by the first paragraph of Plaintiff in Error's answer, the general denial, was simply an issue controverting the allegations of the complaint, and on the trial of such issue the Plaintiff in Error could properly offer in evidence such evidence only as tended to negative what the Defendants in Error were bound to prove under the allegations in their complaint.

Any new matter which Plaintiff in Error desired to urge as a defense to this complaint had to be pleaded specially by way of answer and had to be set forth in a separate paragraph separately numbered.

Among other new matters which Plaintiff in Error sought to plead as a defense to the case made by the complaint was, and is, that the rates prescribed in that order, if enforced, will produce so little revenue as to be insufficient to reimburse Plaintiff in Error for the handling and carrying of the classes of traffic specified in the order and leave a fair and reasonable return to Plaintiff in Error for performing such service, all in violation of the constitutional guarantee accorded Plaintiff in Error by section 1 of article 14 of the Constitution of the United States.

Plaintiff in Error, following the practice prescribed by the practice act of Indiana, specially pleaded this new matter in paragraph two of its answer. To this paragraph the Superior Court of Marion County erroneously sustained a demurrer for want of sufficient facts, and when the case went to trial the only issue presented by the pleadings was the issue made by the complaint and the mere general denial.

Under section 127 of the Act of September 19, 1881, above quoted Plaintiff in Error could not offer any evidence in support of the allegations of its second paragraph of answer and no such evidence was offered, and the issue tendered by that second paragraph of answer namely, that the rates prescribed were confiscatory and deprived Plaintiff in Error of its property without due process of law, was never tried as an issue of fact.

The excerpts from certain testimony introduced on the trial of the case of *Wood, et al., Plaintiffs in Error, vs. Vandalia Railroad Company, Defendant in Error*, 231 U. S., 1, in the Circuit Court of the United States for the District of Indiana, were introduced in evidence on the trial of this case in the Superior Court of Marion County by the plaintiffs below and were admitted in evidence over the objections of the defendant below. Whatever the purpose of the trial court may have been in admitting this testimony over defendants' objections, such testimony was not admitted on any issue of confiscation for the reason that such issue was not involved on the trial. The objections to such testimony made at the time it was offered appear on page 43 of the printed record.

IV.

What has been said under III above we think sufficiently answers the point sought to be made under IV on pages 10 and 11 of the supplemental brief for Defendants in Error, because it sufficiently appears that this case, in the court below, was not tried upon any evidence offered under any issue of confiscation and that in the Supreme Court of the State of Indiana the cause was neither submitted, considered, nor decided upon a record containing any such evidence or any such issue.

V.

The proposition that this case is *res adjudicata* is not well taken. This proposition is based upon the erroneous assumption that the same issues of fact are presented in this record as were presented by the record

and considered by this court in the case of *Wood et al. vs. Vandalia Railroad Company*, 231 U. S., 1.

In the Wood case, there was clearly presented by the bill of complaint and by the answer of the defendants the issue of the confiscatory character of the rates prescribed in the Commission's order. This was the only issue involved in that case and the evidence of both the complainant and the defendants introduced before the Master, to whom the case was referred, was introduced and admitted upon that single issue.

The complainant in the Wood case adopted a theory to prove the confiscatory character of the rates involved which, at the time, was believed by counsel for complainant to be supported by the principles enunciated in the case of *Smythe vs. Ames*, 169 U. S., 466.

In deciding the Wood case, this court held that the evidence offered by complainant was insufficient to show that the rates were confiscatory, and reversed the decree of the Circuit Court for the District of Indiana and ordered the bill dismissed without prejudice. In the Wood case, this court did not decide that the rates involved were not confiscatory, and all that this court did decide in that case was that the proof by which complainant sought to establish the confiscatory character of such rates was insufficient. In the case at bar, the issue of confiscation has never been tried as an issue of fact because the second paragraph of Plaintiff in Error's answer tendering such issue was held on demurrer to be insufficient. The only issues of fact tried in this case in the Marion Superior Court were the issues formed by the complaint and the answer in general denial, and the issues thus formed, as above pointed out under III, did not and could not embrace the issue of confiscation.

VI.

The proposition sought to be presented under VI on pages 12 and 13 of the supplemental brief for Defendants in Error rests upon the erroneous assumption that the federal question presented by this record arises in connection with a trial in the court below, in which evidence was introduced, and upon the further erroneous assumption that the second paragraph of answer contains allegations of mixed law and fact.

The second paragraph of answer unquestionably pleads matters of fact only and the facts thus pleaded, as above pointed out, are the ultimate issuable facts. If the facts thus pleaded be true, then it follows that Plaintiff in Error will be deprived of its property without due process of law, in violation of the federal constitution. All of this is admitted by the demurrer, which was addressed to this second paragraph of answer.

The allegations in the second paragraph of answer are purely allegations of fact and there is, therefore, not presented any such complicated pleading as was involved in the case of *Reagan vs. Farmers Transportation Trust Company,* 154 U. S., 362, cited on page 12 of the supplemental brief for Defendants in Error, and that case has no bearing whatever upon this case.

VII.

Counsel for Defendants in Error is wrong in his assumption that Plaintiff in Error contends that the case of *Northern Pacific Railroad Company vs. North Dakota, Ex Rel McCue,* 236 U. S., 885, overrules the

case of *Wood, et al. vs. Vandalia Railroad Company*, 231 U. S., 1. Plaintiff in Error does not so contend; but does contend that the two cases are readily distinguishable, and such distinction is clearly pointed out in Mr. Justice Hughes opinion in the *Northern Pacific Railroad Company Case*, in the excerpt from that opinion quoted on page 13 of the supplemental brief for Defendants in Error.

All that was decided in the Wood Case was that the proof adduced to establish the confiscatory character of the rates prescribed in the Commission's order was insufficient, and by the dismissal of the bill without prejudice the parties were left free to further litigate the issue of confiscation, and the company was left free to undertake to prove in some other and proper method the confiscatory character of such rates.

In this case the Plaintiff in Error, at the earliest opportunity presented to it after the filing of the complaint in the Marion Superior Court, and in the only proper and appropriate method prescribed by the rules of practice prevailing in the courts in the State of Indiana, sought to raise as an issue of fact the confiscatory character of the rates involved, and was and is prepared to establish that issue by proper and conclusive proof, but Plaintiff in Error has been deprived of exercising that right—a right guaranteed to it by the Constitution of the United States—because of the erroneous decision of the Supreme Court of the State of Indiana.

VIII.

The eighth proposition, presented on page 13 of the supplemental brief for Defendants in Error, is that this case has now become a moot case. The reasons advanced

in support of such proposition are quite novel and because of their novelty are highly interesting.

However, in determining whether this case has now become a moot case it will be unnecessary to even consider or discuss these novel reasons and, for the purpose of argument, all that is stated in the supplemental brief for Defendants in Error with respect to increased rates and the various provisions of the Transportation Act, 1920 (41 Stat., L., 456), may be taken as true.

At the conclusion of the trial of this case in the Superior Court of Marion County the court found for the plaintiffs (Defendants in Error) and issued the decree prayed for. (Printed record, pages 19 and 20.)

Under the decisions of the Supreme Court of Indiana construing the statutory rules of practice and procedure in that state, an appeal from a decree granting an injunction does not operate as a stay or supersedeas, and the party or parties against whom such decree may have been issued are not absolved, pending the appeal, from obeying such decree. *Central Union Telephone Company et al. vs. Board of Commissioners of Tippecanoe County,* 110 Indiana, 203; 10 North Eeastern Reporter, 922.

Plaintiff in Error sought to have suspended the operation of the mandatory injunction issued by the Superior Court of Marion County by invoking the inherent power of that court as a court of equity over its own decrees, and to that end filed with the court its verified petition praying that court to suspend, pending the final termination of this cause in the Supreme Court of Indiana, or in the Supreme Court of the United States, the operation of the decree and the operation of the injunc-

tion contained in such decree. (Printed record pages 21 to 25, both pages included.)

After considering such petition the Marion Superior Court sustained such petition in part and overruled such petition in part.

The court sustained such petition to the extent of suspending the operation of its decree and injunction for the period of thirty days, upon the terms and conditions set forth in the order appearing on pages 27 and 28 of the printed record.

Among the conditions thus imposed by the Marion Superior Court are the following:

(1) That during such period of suspension the Plaintiff in Error should keep a full, true and complete record and account of all moneys received by it for the transportation of the classes of freight specified in the order of the Railroad Company dated December 14, 1906, and mentioned and described in the decree, which record shall show the point of origin and the point of delivery of each shipment of such freight, the name of the consignor, the name of the consignee, the total amount of money collected and received for transporting each of such shipments, and the amount of money so collected and received in excess of the amount that would have been yielded had Plaintiff in Error transported such classes of freight at and for the rates prescribed in the Commission's order of December 14, 1906, and in and by the decree;

(2) That Plaintiff in Error should, within thirty days after the expiration of such period of suspension, file with the clerk of the Marion Superior Court a full, true and correct report of such record and account;

(3) That in the event it shall be held upon final determination of this cause in the court of last resort that said order of the Railroad Commission of Indiana, dated December 14, 1906, is legal and valid, or the rates in such order prescribed and in the decree specified, are legal and valid, Plaintiff in Error shall, within thirty days after the date of such final determination, pay to the clerk of the Marion Superior Court, for distribution upon the order of that court among the persons lawfully entitled to receive the same, such sum of money as shall be equal to the amount of money Defendants in Error collected for the transportation of such shipments during the period of suspension of the decree in excess of the amount Plaintiff in Error would have received during such period had Plaintiff in Error transported such shipments at the rates prescribed in the Commission's order and in the decree;

(4) That Plaintiff in Error shall pay to Defendants in Error such legal damages, if any, which Defendants in Error may be lawfully entitled to recover sustained by them by reason of the suspension of such decree and of Plaintiff in Error continuing during such period of suspension the acts enjoined by such decree.

The Plaintiff in Error was further required by the order of the court to file a bond in the penal sum of $15,000 with the Guaranty Company of North America, as surety, obligating Plaintiff in Error to fully perform all the conditions prescribed in the court's order suspending the operation of the injunction for said period of thirty days. Such bond was filed and approved by the court and appears in the printed record on pages 33 to 36, both pages included.

The order suspending such decree was entered December 23, 1916, and upon the expiration of thirty days

thereafter Plaintiff in Error put into effect the rates prescribed in the decree of the court and in the order of the Railroad Commission in the manner and to the extent prescribed in the decree and in the order.

At twelve o'clock noon, December 28, 1917, the President of the United States, acting under the authority conferred upon him by the Congress, assumed the possession, control and operation of various transportation systems, including the entire transportation system of Plaintiff in Error.

On June 28, 1918, General Order No. 25 advancing freight rates, issued by the Director General of Railroads, theretofore appointed by the President, became effective.

The rates prescribed in the decree of the Marion Superior Court remained in effect from and after the expiration of the thirty-day period, during which such decree was suspended, continuously until June 25, 1918. During the period that the operation of the decree was suspended Plaintiff in Error kept the account and record prescribed in the order suspending such decree, and, thereafter, as prescribed in such order, filed a report thereof with the clerk of the Marion Superior Court.

There is now in the custody and possession of Plaintiff in Error a large sum of money amounting to many thousands of dollars and representing the difference between the revenue received for transporting the shipments of classified freight between Indianapolis, Indiana, and the Illinois-Indiana state line and intermediate stations, at the rates charged therefor and the amount of revenue Plaintiff in Error would have received from transporting such shipments at the rates prescribed in

the decree during the said thirty-day period such decree was suspended.

Under the conditions prescribed in the order suspending the decree, this sum must be retained by Plaintiff in Error until the final determination of this case, and then, in the event it shall be held upon such final determination that the rates prescribed in the Commission's order and in the decree are legal and valid, Plaintiff in Error must, within thirty days thereafter, pay to the clerk of the Marion Superior Court such sum for distribution upon the order of the court among the persons lawfully entitled to receive it.

It is, therefore, obvious that the title to this large fund and its ultimate distribution rest entirely and solely upon the validity and legality of the decree of the Marion Superior Court and the legality and validity of the order of the Railroad Commission of Indiana, upon which such decree is predicated; and upon the authority of the decision of this court in the case of *Grocsbeck et al. vs. Duluth S. S. & A. Ry. Co.*, decided November 10, 1919, and reported in 250 U. S., 607, Plaintiff in Error contends and earnestly insists that this case has not become moot; but, on the contrary, the federal question presented by this record must of necessity be ultimately finally determined in order that a proper and legal disposition may be made of the fund now in the custody and possession of Plaintiff in Error, and which it must hold until this cause is ultimately finally determined.

On page 18 of the supplemental brief for Defendants in Error an effort is made to distinguish the case at bar from *Grocsbeck vs. Duluth S. S. & A. Ry. Co.* on two grounds, namely, (1) that since the decision in

that case the Interstate Commerce Act has been amended by the Transportation Act, 1920; and, (2) in that the rate involved in the Groesback case "was prescribed by statute and no routine was provided for review in the state courts of its confiscatory nature."

The Transportation Act, 1920, amending the Interstate Commerce Act, does not in any way purport to nullify judgments and decrees of state or federal courts, and that act cannot, of course, have any effect upon the decision of the Supreme Court of Indiana upholding the decree of the Marion Superior Court, nor upon the power and authority of the Supreme Court of the United States to afford persons relief from any attempt to deprive them of rights guaranteed them by the Constitution of the United States.

In legal contemplation there is no distinction between a rate prescribed by statute and a rate prescribed by an order of a Commission created by the legislature.

IX.

The only federal question presented in this case arises by virtue of the ruling of the Superior Court of Marion sustaining the demurrer to the second paragraph of answer of Plaintiff in Error, by which Plaintiff in Error seeks to assert a right given it by the Constitution of the United States, and by the decision of the Supreme Court of Indiana affirming the ruling of the Marion Superior Court. By such ruling and decision Plaintiff in Error has been deprived, and will be deprived, of the protection afforded by section 1 of article 14 of the Constitution of the United States unless Plain-

tiff in Error can invoke the jurisdiction, the power and authority of the Supreme Court of the United States, and Plaintiff in Error seeks to do this by the writ of error issued out of the Supreme Court of the United States to the Supreme Court of the State of Indiana to review the error of that court by which Plaintiff in Error was deprived of this right vouchsafed it by the Constitution of the United States.

Plaintiff in Error earnestly but respectfully insists that it is entitled to have the opportunity which it sought in the Superior Court of Marion County, to establish by legal and competent evidence the confiscatory character of the rates which it is commanded to put into effect by the decree of that court, and that the Supreme Court of Indiana erred to the manifest detriment and injury of Plaintiff in Error by affirming the ruling of the Marion Superior Court sustaining the demurrer to the second paragraph of Plaintiff in Error's answer.

Respectfully submitted,

SAMUEL O. PICKENS,
D. P. WILLIAMS,
Attorneys of Record for Plaintiff in Error.

FREDERIC D. MCKENNEY,
CHARLES W. MOORES,
R. F. DAVIDSON,
OWEN PICKENS,
Of Counsel for Plaintiff in Error.

No. 27163.

NOV 20 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 125.

VANDALIA RAILROAD COMPANY,
Plaintiff in Error.

vs.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN AND GEORGE G. GRIFFIN, COMPOSING THE FIRM OF SCHNULL & CO., ET AL.,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

CHARLES W. SMITH,
HENRY H. HORNBROOK,
Attorneys of Record for Defendants in Error.

CHARLES REMSTER,
ALBERT P. SMITH,
PAUL Y. DAVIS,
Of Counsel.

E. A. HARDEN PRINT, INDIANAPOLIS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

VANDALIA RAILROAD COMPANY,
Plaintiff in Error,
vs.
GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN AND GEORGE G. GRIFFIN, COMPOSING THE FIRM OF SCHNULL & CO., ET AL.,
Defendants in Error.
No. 125.

BRIEF OF DEFENDANTS IN ERROR

STATEMENT OF THE CASE.

The statement of the case in the brief of counsel for plaintiff in error correctly states the nature of the suit and that part of the pleadings and rulings by which counsel sought to raise in the state court the federal question upon which they rely. After this statement of the record counsel continue:

"The question involved is this: If the rates fixed by the order of the commission in question will not produce revenue sufficient to reimburse the carrier for the actual cost and outlay in handling and carrying the classes of property specified in the order and provide a fair return to the carrier on the value of its property used and employed in performing the service, is the order constitutional and valid." (Brief of plaintiff in error, pages 3-4.)

As will hereafter develop in our argument, we do not believe that the averments of the second paragraph of answer are sufficient to present the issue of law outlined in the above quotation from the brief of plaintiff in error. It might, nevertheless, be contended that the question thus stated is raised by the evidence. Upon this point the State Supreme Court said (Transcript of Record, p. 107):

> "The cause was tried, and appellant's (plaintiff's-in-error) evidence tends to prove the substance of the answer (second paragraph) as above quoted, and no complaint is made of the exclusion of any offered evidence.
>
> "Whether, therefore, our ruling be based on appellant's construction of its answer or upon the evidence heard, we are satisfied that the defendant has not tendered or made a defense."

We would, therefore, respectfully invite attention to the fact that the only evidence offered by plaintiff in error was a copy of a petition before the Public Service Commission for a suspension of the order in question, and the order denying same, and that plaintiff in error offered no evidence bearing upon the reasonableness of the rate in question. (Transcript of Record, pp. 94-98.)

The statement which we have quoted from the opinion of the trial court is, therefore, entirely without support in the evidence, and unless the averments of the answer are sufficient to raise the question which counsel contend is involved, it is not raised.

BRIEF OF THE ARGUMENT.

The argument of counsel for plaintiff in error is entirely confined to the question outlined on pages 3-4 of their brief. Before proceeding to a discussion of that question we desire to urge upon the court that the issue thus outlined is not raised by the record herein. The only federal question sought to be raised by plaintiff in error arises on the demurrer to the second paragraph of answer, which reads as follows:

> "For a further and second paragraph of answer to plaintiff's complaint, Vandalia Railroad Company, defendant herein, says:
>
> "That the rates specified in the order mentioned in said complaint and which was made and entered by the Railroad Commission of Indiana on the fourteenth (14th) day of December, 1906, and which by its terms was to become effective on the first (1st) day of February, 1907, will not yield to defendant revenue sufficient to reimburse defendant for its actual cost and outlay in handling and carrying the classes of property specified in said order of said Railroad Commission, and provide a fair return to defendant on the value of defendant's property used and employed in handling and carrying the classes of property in said order specified.
>
> "And defendant further says that under Section 1 of Article 14 of the Constitution of the United States, defendant cannot be lawfully deprived of its

property without due process of law, nor be deprived of the equal protection of the laws; and that if the rates specified in said order of the Railroad Commission of Indiana be enforced defendant will be compelled to handle and carry said classes of property in said order specified without deriving or receiving therefrom revenue sufficient to pay the actual cost to defendant of handling and carrying said classes of property and provide a fair return to defendant on the value of defendant's property used and employed in handling and carrying said classes of property, and defendant will thereby be deprived of its property without due process of law in violation and contravention of said Section 1 of Article 14 of the Constitution of the United States.

"Wherefore, defendant says that the rates specified in said order, of said Railroad Commission of Indiana, and likewise said order, are illegal and void, and prays to be hence dismissed and that it have judgment herein against plaintiffs for all its costs and charges herein laid out and expended."

It will be noted that this *does not allege* that the rates in question will not yield "revenue sufficient to reimburse defendant for its actual cost and outlay in handling and carrying the classes of property specified in said order," *between the stations to which the rate applies*, "and provide a fair return to defendant on the value of defendant's property used and employed in handling and carrying the classes of property in said order specified," *between the stations to which the rate applies.*

On the contrary, the answer fails entirely to specify any particular carriage, which, when performed for the rates in question, will be non-remunerative. Consistently with the allegations of the answer, it might well be that the rates in question would be remunerative for "handling

and carrying the classes of property specified in said order" *between the stations to which the rates apply*, and would only be non-remunerative when applied to some other carriage.

Likewise, the answer fails entirely to specify upon what part of the carrier's "property used in handling and carrying the classes of property in said order specified" the rates in question will not yield a 'fair return'. Consistent with the allegations of the answer, the rates in question might yield a fair return on the value of the carrier's property *used in carriage between the stations named in the order*, although not sufficient to "provide a fair return on the value of * * * property used and employed in handling and carrying the classes of property in said order specified" *over some other part of its line.*

Accordingly, to admit by demurrer the truth of the answer is not to admit that the rates in question will not yield sufficient revenue to reimburse the carrier for its actual cost and outlay in handling and carrying the named classes of property between the points named in the complaint, and to provide a fair return on the value of the carriers property used in the carriage of such classes of property between such points. The demurrer simply admits that the rates in question will not yield sufficient revenue to reimburse defendant for its actual cost and outlay in handling and carrying the named classes of property *in all instances* in which it is compelled to handle such classes of property, not merely in the carriage to which the rates apply; and provide a fair return to defendant on the value of all the property used by it *everywhere*, not alone in carriage between the stations named, in handling and carrying the such classes of property.

The allegation "that the rates specified in the order * * * will not yield to defendant revenue sufficient to reimburse defendant for its actual cost and outlay in handling and carrying the classes of property specified in said order * * *," is susceptible of two constructions, viz:

(1) It may mean that the return from the carriage of the named classes of property between the named stations, will not yield sufficient revenue to reimburse the carrier for the cost of handling such property both between the named stations and in all other instances; or

(2) It may mean that the return which would be derived from carrying such classes of property at such rates, in all instances in which the carrier is compelled to carry such property, would not be sufficient to reimburse the carrier for its cost and outlay in all such instances; or more briefly, that if similar rates were applied to all its carriages of all such property, its return would not be sufficient to reimburse it for the cost of all such carriage.

Upon either construction the answer fails to allege sufficient facts to show that the rates are constitutionally unremunerative. As to the first construction, it is obvious that a comparison of the return from the carriage of the named classes of property, between the stations named, with the cost of carriage of such property both there and elsewhere is wholly immaterial in determining the reasonableness of the rates. The only relevant item of cost is the cost of the particular carriage to which the rates apply. As to the second construction, it has been expressly held by this court that in attacking the reasonableness of a particular rate, it is not sufficient to show that such rate,

applied generally, would be unremunerative. *Minneapolis & St. Louis R. R. v. Minnesota*, 186 U. S. 257.

But regardless of which construction is adopted for the portion of the answer last quoted, the remainder of the answer contains a defect which vitiates the whole. To allege that the rates will not "provide a fair return on the value of defendant's property used and employed in handling and carrying the classes of property in said order specified" is by no means to allege that the carrier will not receive a fair return on the value of its property used in the particular carriage to which the rates apply. The value of the carrier's property elsewhere used in carriage of these classes of freight is an element entirely foreign to the issue which the answer attempts to tender; since there is no allegations as to the revenue which actually is received from such other carriage. Whatever the return to which defendant may be entitled on the value of its property used in the carriage of the named classes of freight *between the stations to which the rates apply*, it is obviously not entitled to a return from such carriage on the value of its property *used elsewhere, between other stations, or on other lines or divisions*, in the carriage of such classes of freight. Yet the property mentioned is property used "in handling and carrying the classes of property specified" and is not limited to property used for such carriage between the named stations.

However, even if it be assumed that it sufficiently appears that the rates specified in the order are not sufficient to pay the cost of the particular service to be rendered for those rates and in addition a 'fair return' on the value of that part of the carrier's property used in performing that

service, we submit that the plaintiff in error has failed to show that the rates are unconstitutionally non-remunerative.

Counsel rely entirely on *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, and *Norfolk and Western Ry. v. West Virginia*, 236 U. S. 605. In the first of these cases, a statutory freight rate on coal, applying to all intrastate traffic within the State of North Dakota, was held unconstitutional upon a showing that after paying all costs and expenses, including both 'out of pocket' costs attributable to the particular traffic and a more or less arbitrarily apportioned share of total operating expenses, the net proceeds would be merely nominal, affording no substantial contribution to the total net return on the carrier's investment. The West Virginia case exhibits analogous circumstances in connection with a passenger rate applying to the entire state.

These cases are clearly distinguishable from the situation presented by the allegations of the answer. In the first place, the answer does not allege that the revenue to be yielded by the rates will be insufficient to reimburse defendant for its cost and outlay on the traffic; but alleges that such revenue will not be sufficient to cover such "cost and outlay" *and* a "fair return" on the property used in the service. Consequently, it must be assumed that there is some surplus or net revenue above such "cost and outlay". The statement, that "since the carrier is entitled to receive a fair return upon the value of all its property used for the benefit of the public to hold that the carrier may be required to carry a part of its traffic at a loss would mean that the loss must be made good by rates imposed

upon other parts of its traffic," on page 8 of the brief, is not germane to the issues because the answer shows no loss.

The answer merely states that such surplus or net revenue is insufficient to "provide a fair return to defendant (plaintiff in error) on the value of defendant's property employed." It does not otherwise indicate what the size of that surplus is. It is not alleged that such surplus is insufficient to pay that proportion of a reasonable return on the value of the carrier's property used therein with the earning of which this particular traffic is reasonably chargeable. For all that appears in the answer, this surplus may be much more than sufficient to provide for plaintiff in error that portion of the fair return on the value of its property which this particular traffic could reasonably be expected to pay.

Conceding for the sake of argument only, that the decisions in the two cases last cited go to the full extent of requiring that the net proceeds from every service performed, no matter how small the item, shall be sufficient to yield a *fair proportion* of a reasonable return on the entire investment; a proposition which we believe is far beyond either the decision or the reasoning of those cases; nevertheless, no court has ever decided, and we believe that no one has ever contended, that the net return realized by a carrier from any particular class of traffic or service should, in and of itself, be sufficient to pay a fair return on the value of the entire property employed in the service. Merely to state such a proposition would be to refute it.

The entire, or at any rate a very large part of the invested capital of every carrier is employed by it indiscrim-

inately in hauling many different classes of freight and performing many different services, for each of which it receives different rates, and each of which yields a different net return.

If the carrier were allowed to derive from each of these separate items or classes, a fair return on the value of property employed in performing that and other services, it would result that the sum of the net returns from all classes of service rendered by a carrier would be many times the amount of a reasonable return on its invested capital. Such a result is absurd.

In both the North Dakota and West Virginia cases it appeared that the net return on the traffic in question was so small as to be merely nominal, and thus that its contribution to the entire net revenue was entirely disproportionate to the volume of the traffic. It was said in the latter case:

> "It is clear that by the reduction in rates, the company is forced to carry passengers, if not at or below cost, with merely a nominal reward considering the volume of the traffic affected."

In the present case it merely appears that the revenue from these rates will not, alone, be sufficient to pay a fair return on the value of the property employed, but it does not appear, either that this traffic will not produce a net revenue; or that the revenue from this and other traffic in which the same property is employed will be insufficient to pay such fair return on that investment; or that the net return from this traffic will be disproportionately small.

Consequently, although the North Dakota and West Virginia cases be given their broadest application in favor

of plaintiff in error, the rule announced will not establish the sufficiency of the answer.

In both North Dakota and West Virginia cases there were certain controlling factors which do not here appear. In both cases the rates in question were applicable to the entire intrastate traffic in a particular commodity or class of service. Here it appears from the complaint and also from the evidence that the line of railroad to which the rates applied is only one "among others" which plaintiff in error operates in the State of Indiana. In both of the cases cited it also appeared that any return, over and above the "cost and outlay", was merely nominal and afforded an entirely negligible contribution to the net earnings of the carriers. Here, even though it be assumed that the return is not fairly proportionate to the volume of the traffic, there is no allegation from which it can be assumed that the contribution to the railroads net revenue is so merely nominal that it can be disregarded, or that, although it may not bear that mathematical proportion to the entire net earnings which it should bear according to good business practice, it does not afford a substantial increase in net revenues which would not otherwise accrue if the traffic were compelled to bear a heavier rate burden.

Considering the second of these distinctions, it may be admitted that the North Dakota and West Virginia cases have greatly discredited the previous theory and practice under which a rate which returned any revenue over and above "out of pocket" costs was considered to be constitutionality remunerative, even though it did not even return that portion of the "overhead" or operating expenses incurred generally for all traffic which by good accounting practice was reasonably attributable to it; provided the

entire net revenue afforded reasonable return on the entire investment. It is perhaps true also that the opinions in these cases require that a rate applying generally throughout a state shall afford revenue not only sufficient to repay the "out of pocket" expense and its proper proportion of the "overhead" or operating attributable to all traffic, but shall also afford a substantial net return in addition. This is not to say, however, that this net return derived from each class of traffic must be a "fair return." The carrier is, of course, entitled to a "fair return", that is, reasonable interest, on its entire investment, from its entire business. What is meant by a "fair return" from a part of this business is entirely problematical. Construed most favorably to plaintiff in error, this allegation of the answer means such a return as would be chargeable against it by good accounting practice, in order that each item of business might "fairly" bear its share. Even when the words are thus favorably construed, to allege that certain rates do not produce a "fair return" on investment over and above "cost and outlay" is by no means to allege that the return produced is so nominal as not to be a substantial contribution to the carrier's net revenue. And as said in the North Dakota case, "the legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business." (Pp. 598-599.)

The other important distinction between the cases cited and this case is that the former dealt with the carrier's entire intrastate traffic in a certain commodity or classification of freight. Here the rates in question deal with

only a part of the carrier's lines. If the contention of plaintiff in error be sustained, it would follow that the rate on any particular article or class of freight between any two stations could be shown to be unreasonable by showing, by accounting methods necessarily more or less arbitrary, that after deducting the "out of pocket" cost and proportion of overhead attributable, such rate would not provide a net return entirely commensurate with the relation of the traffic in question to the total traffic; and this without regard to the return received by the carrier from its other intrastate business.

In the cases cited the court was very careful to guard its opinion from such a construction. In *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 599, the court said:

> "Nor is its (the state's) authority hampered by the necessity of establishing such minute distinctions that the effective exercise of the rate making power becomes impossible. It is not bound to prescribe separate rates for every individual service performed, but it may group services by fixing rates for classes of traffic."

And again:

> "The court, therefore, is not called upon to concern itself with mere details of a schedule; or to review a particular tariff or schedule which yields substantial compensation for the services it embraces, when the profitableness of the intrastate business as a whole is not involved."

Indeed, the court was careful to distinguish, and not to overrule, previous decisions sustaining rates or regulations under circumstances almost exactly parallel with

those here exhibited. Thus in *St. Louis & San Francisco Ry. v. Gill*, 156 U. S. 649, a carrier defended an action for a penalty for its failure on one division to observe a statutory passenger rate of state wide application, by showing that on this division the rate resulted in loss. This was held to be no defense, the court saying, p. 655:

> "In this state of facts we agree with the views of the Supreme Court of Arkansas, as disclosed in the opinion contained in the record, and which were to the effect that the correct test was as to the effect of the act on the defendant's entire line * * *; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road may be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative."

The North Dakota case not only does not overrule this decision, but quotes with approval from that part of the opinion above set forth.

In the present case the facts alleged are even less favorable to the carrier, since it does not appear even that the entire freight business on this one division will not yield its proportionate share of the net revenue to which the carrier is entitled, but only that the business of carrying the named classes of property on this division will not yield a "fair return"; and for all that appears the revenue derived from other traffic on this division and from the traffic on other divisons under rates fixed by the State Commission will yield a fair return on the value of the carrier's property employed, and the rates in question a substantial contribution to that return.

Other decisions which support the principle involved in the ruling of the State Supreme Court, and which re-

main unshaken by the North Dakota and West Virginia cases are *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 186 U. S. 257, and *Willcox v. Consolidated Gas Co.*, 212 U. S. 19.

The rates fixed by the state, either by the legislature directly, or through its "administrative agent", the commission, for the lines of the plaintiff in error in Indiana, form one entire scheme; though the legislative will be expressed in various separate orders. Whatever may be the proper construction of the answer, it is undoubtedly an attempt to segregate a particular traffic, on a particular division, and without alleging that the rates in question compel service below cost, and without alleging that the net return is so small as to be unsubstantial, to attack their unconstitutionality on the ground that the net return is, in some indefinite sense, "unfair". To permit the carrier to attack each separate order by showing that the rates therein prescribed do not yield a "fair return", is as much out of harmony with any decided cases as would be a similar attack on any particular part of any separate order. We submit that the state rate making power is not thus narrowly confined, and that the judgment should therefore be affirmed.

Respectfully submitted,

CHARLES W. SMITH,
HENRY H. HORNBROOK,
Attorneys of Record for Defendants in Error.

CHARLES REMSTER,
ALBERT P. SMITH,
PAUL Y. DAVIS,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. 125

VANDALIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN AND GEORGE G. GRIFFIN, Comprising the Firm of SCHNULL & CO., ET AL.,
Defendants in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

This supplemental brief of the defendants in error is filed pursuant to leave granted therefor at the argument herein had on December 17, 1920.

STATEMENT OF THE CASE.

The Railroad Commission of Indiana on December 14, 1906, pursuant to a full hearing made an order to

be effective from February 1, 1907, fixing a certain scale of class rates for application on the St. Louis Division of the Vandalia Railroad extending from Indianapolis west to the Illinois-Indiana state line. This order, in part, is set forth in the complaint herein appearing in the printed record at pages 4 and 5. On January 22, 1907, the railroad filed its Bill of Equity in the U. S. Circuit Court for the District of Indiana, seeking to enjoin this order. The temporary injunction was denied by the U. S. District Court for the District of Indiana, May 3, 1907, but a perpetual injunction was ordered by the U. S. Circuit Court June 29, 1909, from which order that proceeding was appealed to this Court upon writ of error and this Court in Wood vs. Vandalia R. R. Co., 231 U. S. 1, decided October 20, 1913, found that the rates fixed by this order were not shown to be confiscatory and the case was remanded with an order to dismiss without prejudice. The railroad did not institute supplemental proceedings in the Federal Court nor did it put into effect the rates ordered. The railroad on November 12, 1913, filed with the Public Service Commission of Indiana, the successor to the Indiana Railroad Commission, a petition for a rehearing on the order of December 14, 1906, which petition is set out in the printed record at page 95. This petition was denied on November 18, 1913, and on the same date there is of record a letter to Mr. John G. Williams, General Counsel, Vandalia Railroad, Indianapolis, Indiana, stating in effect that the Commission had decided not to grant a rehearing nor suspend the order but that the Commission was willing to consider the question of compromise rates provided the railroad would first comply with its order and recognize the authority of the

Commission by publishing the rates. This letter appears as Exhibit No. 16 in the trial of this case and is reproduced at page 97 of the printed record. The rates never having been published, the defendants in error, who are shippers interested in the effectiveness of these rates, filed on August 26, 1915, their petition in the Circuit Court of Marion County, Indiana, seeking a mandatory injunction requiring the plaintiff in error, the Vandalia Railroad Co., to apply the rates ordered. To this petition the railroad made answer in three paragraphs on December 13, 1915. The first paragraph setting forth a general denial, the second paragraph attempting to set forth a special defense based on alleged confiscation, and the third paragraph setting forth that the rates then being charged, which were higher than the rates ordered, were rates published in tariffs which had been filed pursuant to the amended provisions of the Railroad Act of Indiana. Demurrers to paragraphs two and three were sustained by the Superior Court of Marion County, to which the case had been removed, and the case went to trial on the general denial. *Upon this trial no evidence tendered by the Railroad was excluded.* The evidence offered at the trial included no facts relative to the confiscatory nature of the rates fixed in the order involved except extracts from the record made in the Federal Court in the Wood case upon which this Court found the rates not to have been shown to be confiscatory. Upon such a record the Superior Court of Marion County, gave judgment for the plaintiffs. The decree and the injunction granted in the decree were suspended for a period of 30 days, conditioned upon the filing of a suspense bond for $15,000 and certain other conditions recited (printed Record, page

27). An appeal from the judgment of the Superior Court of Marion County was taken to the Supreme Court of Indiana and that Court upon the record affirmed the judgment of the Superior Court. The case is now before this Court on writ of error to the Supreme Court of Indiana upon five assignments of error set forth in the printed record at page 114. The assignments of error broadly speaking raise two issues (1) that the Supreme Court of Indiana erred in sustaining the demurrer to paragraph 2 of the answer. (2) That the Supreme Court of Indiana erred in holding upon the record that these rates had not been shown to be confiscatory.

BRIEF OF THE ARGUMENT.

I.

Paragraph 2 of the Answer is as follows:

> "For a further and second paragraph of answer to plaintiff's complaint, Vandalia Railroad Company, defendant herein, says:
>
> "That the rates specified in the order mentioned in said complaint and which was made and entered by the Railroad Commission of Indiana on the fourteenth (14th) day of December, 1906, and which by its terms was to become effective on the first (1st) day of February, 1907, will not yield to defendant revenue sufficient to reimburse defendant for its actual cost and outlay in handling and carrying the classes of property specified in said order of said Railroad Commission, and provide a fair return to defendant on the value of defendant's property used and employed in handling and carrying the classes of property in said order specified.

"And defendant further says that under Section 1 of Article 14 of the Constitution of the United States, defendant cannot be lawfully deprived of its property without due process of law, nor be deprived of the equal protection of the laws; and that if the rates specified in said order of the Railroad Commission of Indiana be enforced defendant will be compelled to handle and carry said classes of property in said order specified without deriving or receiving therefrom revenue sufficient to pay the actual cost to defendant of handling and carrying said classes of property and provide a fair return to defendant on the value of defendant's property used and employed in handling and carrying said classes of property, and defendant will thereby be deprived of its property without due process of law in violation and contravention of said Section 1 of Article 14 of the Constitution of the United States.

"Wherefore, defendant says that the rates specified in said order, of said Railroad Commission of Indiana, and likewise said order, are illegal and void, and prays to be herein dismissed and that it have judgment herein against plaintiffs for all its costs and charges herein laid out and expended."

The demurrer to this paragraph was properly sustained:

(a) For the reasons set forth in the original brief of the defendants in error.

(b) The paragraph is insufficient for the further reason that it states no issue of fact but the mere conclusion of the pleader as to a material fact.

(c) The paragraph is demurrable under the laws of Indiana because it states no defense under those laws.

The Railroad Act of Indiana of 1905 under which the Railroad Commission of Indiana undertook to pre-

scribe the rates fixed in this order under Section (6) thereof sets out the routine that should have been followed in the Courts of Indiana if any party affected by such order desired to contest same on the ground of its confiscatory nature, as follows:

> "Sec. 6: If any Railroad Company or other corporation or party in interest shall be dissatisfied with any rate, classification, rule, charge or general regulation made, approved, adopted or ordered by the Commission, such dissatisfied company or party may, within sixty days after any such action has been taken by the Commission, procure from the Secretary of the Commission, whose duty it shall be to furnish the same, a complete transcript of all the proceedings of the Commission relative thereto, and if he or it so desires, a copy of all the evidence heard or considered by the Commission at the hearing at which such action or decision was made, which evidence shall be incorporated into such transcript, and such dissatisfied company or party may file said transcript, with a concise written statement of its or his causes of complaint against the action of the Commission, in the office of the Clerk of the Appellate Court of Indiana within thirty days after procuring the same, and not later than ninety days after the action of the Commission complained of has been spread upon its records. Said complaining company or party shall, at the time of filing such transcript, give or cause to be given to said Commission written notice thereof, and shall, within five days thereafter file proof of such notice in the office of said Clerk of the Appellate Court, who shall, ten days thereafter, or upon the appearance of said Commission to said appeal, place said cause upon the docket of the said Appellate Court for hearing and determination. The Commission shall be made a party to such proceeding in the Appellate Court,

and shall defend the same. All such causes shall be given precedence over all other civil causes in said Appellate Court, and shall be heard and determined upon the transcript filed as aforesaid, as speedily as possible to the end that public interests may not suffer by reason of such appeal. Jurisdiction to hear and determine such appeals, and the power to adopt rules of procedure to facilitate the speedy determination thereof not inconsistent with this act, are hereby conferred upon the Appellate Court of Indiana. The Appellate Court shall have power to affirm the action of the Commission appealed from, or to change, modify or set aside the same as justice may require. The decision of the Appellate Court in any such matter, shall be final, and said Commission shall keep copies of all such findings and judgments on file in its office."

It is the contention of the defendants in error that this section specified the routine that was to be followed by the Vandalia Railroad if it wished to raise the question of the confiscatory nature of these rates; that this routine was the only routine permitted under the laws of Indiana; that paragraph 2 was not a compliance with this requirement of the substantive law of Indiana, that for this reason paragraph 2 failed to state a defense that was available to the Railroad in the State Court at the time of the filing of the answer.

The Railroad Act was amended in 1907 and Section 7. paragraph (c) added to the powers of the Commission as follows:

"(c) The Commission shall have authority to grant rehearings in any case in which it has made a final order, or to alter, change or modify any final order made by it. All orders of the Commis-

sion, except as otherwise provided in this act, shall take effect within such reasonable time, not more than thirty days after entry thereof, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or set aside, or modified by the Commission, or be suspended or set aside, or modified by a court of competent jurisdiction."

Pursuant to this power to grant rehearings the Railroad as has been before stated, on November 12, 1913, just after the decision by this Court of the Wood Case, filed a petition with the Railroad Commission to rehear the case and modify its order and this petition was denied by order of the Commission of November 18, 1913.

The amendment of 1907 also changed Section 6 above quoted to read in part as follows:

"Sec 6. Any carrier, or other party, dissatisfied with any final order made by the Commission, may, within thirty days after entry thereof, begin an action against the Commission in any court of competent jurisdiction in any county in this state into or through which any such carrier operates, to suspend or set aside any such order. Any party to any final judgment of any court in this state, in any proceeding by or against such Commission, may prosecute an appeal therefrom to the Supreme Court of this state in the manner now provided by law in civil cases, excepting as otherwise provided in this act."

Under this amended Section 6 the Railroad within 30 days from November 18, 1913, could have begun an action in the Marion County Circuit Court against the

Railroad Commission upon its order denying the rehearing. But rather than observe any of the routine specified in the state laws for raising in the state Courts the question of the confiscatory nature of the rates prescribed in this order, it chose to do nothing. It did not obey the order and it did not pursue the remedy open to it upon appeal.

There is nothing in the Railroad Act permitting a railroad against which an order has been entered, to set up the question of the confiscatory nature of the rates prescribed as a special defense in a suit which it is necessary to institute to enforce the application of the rates ordered.

Paragraph 2 was an attempt to raise a defense that was barred after the lapse of 30 days from the date of the order denying the rehearing. The paragraph consequently failed to state a defense under the state laws of Indiana, which are reasonable in their provisions.

Of course the Railroad still had its remedy in the Federal Court because the Wood case had been dismissed without prejudice but the present action was an action in the State courts and we submit that in the State Courts the matter alleged in this paragraph was not a defense when pleaded. It might have been a defense if pleaded within 90 days from February 1, 1907, or within 30 days from November 18, 1913, but by reasonable provision of the laws of Indiana it was barred as a defense on December 13, 1915, the date this answer was filed, in any proceeding in the State Courts of Indiana.

We submit that the Supreme Court of Indiana did not err in sustaining this demurrer.

II.

The case is before this Court on error to the Supreme Court of Indiana for alleged error committed by that Court in interpreting the rules of pleading of that State.

This Court will be reluctant to disturb the decision of a State Court interpreting its own rules of pleading unless it be made to appear that the error alleged has resulted in a denial of due process of law.

In the face of the provisions of the Indiana Railroad Act above quoted, it cannot be said that there has been any denial of due process in this case. Certainly it cannot be possible that a litigant must have his case decided by the Supreme Court of the United States else there is a denial of due process under the Federal Constitution.

III.

The sustaining of this demurrer in no wise affected the Railroad adversely in its case on the general denial.

It was insisted before the Supreme Court of Indiana that in the trial on the general denial the Railroad could have introduced any evidence on the question of confiscation which it might have introduced under its paragraph two and it is a fact as pointed out in the opinion of the Supreme Court of Indiana that no evidence offered was excluded.

IV.

The Supreme Court of Indiana did not err in finding on the evidence of record that the rates were not shown to be confiscatory.

The evidence of record insofar as it concerns the

issue of confiscation, is extracts from the record in the Wood case which this Court found to be barren of the necessary facts to establish the confiscation alleged.

In its decision the Supreme Court of Indiana was guided largely by the opinion of this Court in the Wood case.

In that case in an opinion delivered by Mr. Justice Hughes, it was stated at page 3:

> "There was no proof of the value of the complainant's property within the State of Indiana, or of the return it received from its entire intrastate business. Nor was there proof of the value of that portion of its road which was affected by the order, or of the return from all of its intrastate business upon that part of its lines. No attempt was made to supply proof of that sort. For all that appears, the Vandalia Company might enjoy, notwithstanding the enforcement of the rates in question, ample revenue from its intrastate operations to give it a fair return both as to all its lines within the state and also as to that portion to which the order referred."

The Court further said at page 8:

> "The evidence showed that the class rates on local traffic on the line between Indianapolis and the Illinois boundary which were maintained by the Vandalia Company and condemned by the Commission as unreasonable were higher than the class rates for corresponding distances to local stations in Indiana on other lines (including one of the Vandalia company's divisions) running out of Indianapolis to the east and south. It wholly failed to sustain the contention that the action of the Commission in ordering the reduction complained of transcended the limits imposed by the 14th Amendment."

V.

This case is *res adjudicata* in this Court.

As outlined heretofore the record of the trial on the general denial contains only extracts from the Wood case on the question of confiscation. The same question is before the Court as was presented in the Wood case upon the identical facts tried once before in that case.

VI.

This case will be tried on the evidence and not upon an implied admission of the confiscation under the demurrer to paragraph 2.

The admission of the demurrer will be considered as such only for the purpose of testing the demurrer.

The admissions under the demurrer will not be taken as establishing the fact of confiscation when the confiscation is alleged as a mixed question of law and fact, as here.

Paragraph 2 does not set out the facts which if proved would as a legal conclusion result in confiscation. The allegation as made is an allegation of mixed law and fact.

In Reagan vs. Farmers Transportation Trust Company, 154 U. S., 362 at page 401; this Court said:

> " * * * There are often in pleadings general allegations of mixed law and fact, such as of the ownership of property and the like, which standing alone are held to be sufficient to sustain judgments and decrees, and yet are always regarded as qualified, limited, or even controlled by particular facts stated therein. It would not, of course, be tolerable for a Court administering equity to seize upon a technicality for the purpose

or with the result of entrapping either of the parties before it. Hence, we should hesitate to take the filing of the demurrers to these bills as a direct and explicit admission on the part of the defendants that the rates established by the Commission are unjust and unreasonable. * * * "

VII.

This Court in Northern Pacific R. R. Co. vs. North Dakota, Ex. Rel., McCue, 236 U. S., 585, did not overrule its decision in the Wood case, *supra*, as plaintiffs in error seem to contend.

Mr. Justice Hughes wrote both opinions and in his opinion in the North Dakota case he took occasion to distinguish that case from the Wood case on the facts at page 603 as follows:

> "In Wood vs. Vandalia R. R. Co., 231 U. S., 1, rate order of the State Commission related to the particular sort of traffic, and it appeared that the proof was insufficient to show the cost of transportation."

VIII.

This case has become a moot case in this Court.

Since the order of the Railroad Commission of Indiana of December 14, 1906, the Interstate Commerce Commission has increased the interstate rates applicable in the State of Indiana by varying percentages at different times as follows: In 1914—5% (The Five Per Cent Case, 31 I. C. C., 351; 32 I. C. C., 325); in 1917, pursuant to the so-called Central Freight Association class rate scale readjustment a further increase was permitted which cannot be stated as a uniform percentage, the increases varied, averaging, however, approxi-

mately 25% (C. F. A. Class Scale Case, 45 I. C. C., 254, appendix, page 294 and page 299); in 1917 a further increase of 15% (The Fifteen Per Cent Case, 45 I. C. C., 301); June 25, 1918, 25% authorized under Director General's Order No. 28; a further increase authorized by the Interstate Commerce Commission as of August 26, 1920, of 40% (Increased Rates, 1920, 58 I. C. C., 223).

The Transportation Act of 1920 (41 Stat., L., 456) effective March 1, 1920, amended Section 13, paragraph 3 of the Interstate Commerce Act providing that any interstate carrier may file a complaint with the Interstate Commerce Commission against any intrastate rate which it deems to be too low. And the Interstate Commerce Commission is given jurisdiction under paragraph 4 of Section 13 upon such a complaint after a full hearing to remove any unjust discrimination against interstate commerce by increasing the intrastate rate:

> "the law of any state or the decision or order of any state authority to the contrary notwithstanding."

Any intrastate rate or set of rates which the Interstate Commerce Commission upon such complaint may find to be unduly low must necessarily result in an undue burden upon interstate commerce and any undue burden upon interstate commerce must necessarily be an unjust discrimination against interstate commerce such that the jurisdiction of the Interstate Commerce Commission under Section 13, paragraph 4 attaches and gives it authority to increase such intrastate rate or rates.

This new statute power over intrastate rates imposed upon the Interstate Commerce Commission by this amendment is but the substantive enactment of the doctrine announced by this Court in Houston & Texas Ry. vs. United States, 234 U. S., 342. (The Shreveport Case.)

Consideration of the confiscatory nature of any rates is nothing more nor less than a consideration of the reasonableness *per se* of the particular rates. This Court in construing the powers of the Interstate Commerce Commission with respect to interstate rates has uniformly held that since the passage of the Hepburn Act endowing the Interstate Commerce Commission with the power to prescribe reasonable interstate rates, the Courts are without jurisdiction to pass upon the question of the reasonableness *per se* of any interstate rate but that that question is one for the sole jurisdiction of the Interstate Commerce Commission and the Courts will review the orders of that Commission only to the extent that such orders appear to be arbitrary or against the evidence.

The new power of the Interstate Commerce Commission over intrastate rates imposed by this amendment, in a proper case, gives it the same authority to pass upon the reasonableness *per se* of intrastate rates as it has in determining the reasonableness *per se* of interstate rates.

Should not this Court apply the same rule with respect to this new power of the Commission over intrastate rates as it has always applied with respect to the Commission's jurisdiction over interstate rates? This new power being reposed in the Interstate Commerce Commission by the Congress, will this Court undertake to pass upon the facts themselves except to review the

findings of that Commission as to the facts where those findings are alleged to be arbitrary or against the evidence?

It is our contention that this amendment to the Interstate Commerce Act when applied in connection with the doctrine that this Court has uniformly announced with respect to the jurisdiction of the Interstate Commerce Commission over interstate rates has, in a sense, ousted the jurisdiction of the Courts henceforth to try the question of alleged confiscation (unreasonableness) of intrastate rates as much so as the question of confiscation (unreasonableness) with respect to interstate rates.

This case is a moot case in this Court for the further reason that the Public Service Commission of Indiana, the successor of the Railroad Commission, has adopted for intrastate application generally all the increases authorized by the Interstate Commerce Commission except the last 40% increase, in lieu of which it has authorized an increase of 33 1/3%. A complaint is now pending, however, before the Interstate Commerce Commission (In the Matter of Rates, Fares and Charges Applicable Between Points in the State of Indiana, I. C. C. Docket, No. 11,894) in which the interstate carriers serving Indiana, including the Vandalia Railroad, are seeking to have that Commission under its amended powers, apply the full 40% increase to the Indiana intrastate rates.

If the carriers are successful in this last mentioned proceeding the intrastate rates generally in Indiana will have been increased 110% since the rates in this order were prescribed. The rates at present in effect between the points here involved include all the increases al-

lowed based not upon the rates fixed in this order but upon the rates which the Commission found to be unreasonable.

Since the increases aggregating already 103 1/3% allowed by the Indiana Commission were general increases applicable to all intrastate rates in the state it is but the fair implication to presume that the rates which the Railroad would be required to apply if this Court dismisses this appeal, will be the rates fixed effective February 1, 1907, increased 103 1/3% or such other percentage as has been generally applied since that date.

It is true that a perpetual injunction was decreed by the Superior Court of Marion County and that this judgment was affirmed by the Indiana Supreme Court, yet if this Court dismisses this appeal and does not affirm the decision of the Supreme Court of Indiana, the matter will repose in such a status that the blanket increases can be applied in spite of the perpetual injunction. If the Railroad should put in the rates ordered effective Feb. 1, 1907, increased 103 1/3% or other percentage generally authorized and it was cited to show cause why it should not be punished for contempt, a showing that the Indiana Commission had authorized the general increases applied, would or should be a showing of sufficient cause why it should not be punished. It should be noted also that in the order suspending the decree (page 28 printed record) the right of the railroad to apply to the Court for any modification of the decree is specifically reserved. Or the Railroad could file a complaint with the Interstate Commerce Commission against the present application of rates ordered to be effective February 1, 1907, and se-

cure relief. The authority of the Interstate Commerce Commission to increase intrastate rates is to be observed:

> "The law of any state or the decision or order of any state authority to the contrary notwithstanding."

The instant case is distinguishable from the decision in Groesbeck v. Duluth, South Shore & Atlantic R. R. Co., 250 U. S., 607.

1. Since that decision (November 10, 1919) the Interstate Commerce Act has been amended as above indicated.

2. In that case the rate was prescribed by statute and no routine was provided for review in the State Courts of its confiscatory nature. There was no due process available to the litigants except to have the question of who was entitled to the impounded funds passed upon by this Court. Here, however, the rates were prescribed by a State Commission and ample and sufficient routine or procedure was provided for review in the State Courts of the rates prescribed. The Supreme Court of Indiana in interpreting the rules of procedure so provided has decided to whom the impounded funds belong and we submit that in that decision there has been no denial of due process of law.

IX.

The defendants in error, shippers of Indiana, have been kept out of the rates to which the rate regulating authority of their State after full hearing and in due course has decided they were entitled to enjoy.

We submit that these shippers are entitled to the

judgment of this Court affirming the judgment of the Supreme Court of Indiana or dismissing this appeal.

Respectfully submitted,

KARL KNOX GARTNER,
Counsel in Argument for Defendants in Error.

GIDEON L. BAKER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 125.—October Term, 1920.

Vandalia Railroad Company, Plaintiff in Error,
vs.
Gustav A. Schnull, William J. Griffin, and George C. Griffin, composing the firm of Schnull & Company, et al.

In Error to the Supreme Court of the State of Indiana.

[February 28, 1921.]

Mr. Justice McKenna delivered the opinion of the Court.

Defendants in error, alleging themselves to be engaged either as wholesale or retail grocers in Indianapolis, Indiana, brought this suit against plaintiff in error, herein called the Railroad Company, to restrain it from charging or receiving any other compensation than that mentioned and described in an order entered by the Railroad Commission of the State on December 14, 1906, and which, it is alleged, became effective February 14, 1907, and to require the Railroad Company to receive and transport freight at the rates prescribed in the order of the Commission.

The first pleading of the Railroad Company was a demurrer to the complaint. We omit it as it was overruled and as the case depends upon the answer of the Railroad Company and a demurrer to it. It was in three paragraphs. In the first it denied "each and every material allegation" of the complaint. In the second it alleged that the order of the Commission would not yield "revenue sufficient to reimburse the Railroad Company for handling and carrying the classes of property specified in the order, and provide a fair return on the property used in the service." And that, therefore, if the order of the Commission should be enforced, the Railroad Company would be deprived of its property without due process of law in violation of the Fourteenth Amendment. In the third paragraph it alleged that within 60 days after the act of

the State took effect it filed with the Commission a schedule of its rates and charges between all of the points in the State, had kept on file a like schedule in every station and depot and in its offices, that its charges had been in accordance with such schedules, and were legal rates for the service, and complainants (defendants in error) had not been and were not damaged thereby. Dismissal of the suit was prayed.

There was a demurrer to the second paragraph for insufficiency to constitute a defense, and, following the local practice, there was a memorandum specifying the grounds, as follows: (1) There was no statement that the order of the Commission was unremunerative or confiscatory at the time it was made, or at the time suit was brought, but only at the time the answer was filed. Nor did it aver that at either of those times the rates would not pay the cost of the service to which they were applicable and leave the company a fair return upon the property used in the service. (2) Nor aver that when taken in connection with the other rates lawfully prescribed by the Commission and its successor, the Public Service Commission, the rates did not afford an adequate and remunerative compensation for the handling and transportation of all classes of freight or passengers covered by such orders. (3) The averment that the rates were not compensatory "states no issue of fact, but the mere conclusion of the pleader as to a material fact." (4) The answer did not profess to set out the schedules of rates filed with the Commission or posted in the offices of the Railroad Company. And further, that if the schedules of rates varied from those of the Commission, they were thus far unlawful and invalid under the laws of the State and constituted no defense to the action; "the mere continuance in such wrongful conduct" did "not constitute a defense." And further, if the rates charged were the same as those prescribed by the Commission, the fact could be proved under the general denial.

The demurrer was sustained by the court and the Railroad Company ruled to answer by September 5, 1916. The company, elected to stand by its answer and declined to plead further. The case, therefore, rested on the complaint and the denial of its allegations by the Railroad Company, and upon the issue thus made there was a trial upon which, over the objection of the Railroad Company, a transcript of the record of the suit brought by the Railroad Company against Union B. Hunt, et al., constituting the Railroad

there were admitted in evidence

Commission of the State, in the District Court of the United States for the District of Indiana, and a transcript of the record in the same case in this court, entitled *Wood* v. *Vandalia Railroad Company* (231 U. S. 1), and, over objection, the proceedings before the Railroad Commission under which the order was made, establishing the rates that are the subject of controversy.

The court enjoined the Railroad Company from charging, collecting or receiving from plaintiffs and others in like situation other rates than those mentioned in the order of the Commission, and enjoined the rates in excess thereof. The decree specifically mentioned the rates to be charged. It was affirmed by the Supreme Court of the State.

It will be observed, therefore, that one of the grounds of the demurrer to the second paragraph of the answer of the Railroad Company was not that the rates were non-compensatory but that they were not alleged to be so at the time of the order of the Commission or at the commencement of the suit but were only alleged to be so at the time of filing the answer. The Supreme Court seems to intimate concurrence in this view of the answer, but said whether its ruling be based on that construction of the answer "or upon the evidence heard" it, the court, was satisfied that the railroad had "not tendered or made a defense, and that the decision" of the trial court was correct.

The court put in contrast the contentions of the parties as follows: "Appellees [plaintiffs] assert that, for all that thus appears, appellant may receive sufficient net income on all its other business on this division, and on all of its business, including the specified classes, on other divisions, to furnish it a fair return on all its investments and operations, including the transportation of these classes and therefore appellant will receive all to which it is entitled, though this order be enforced." "Appellant [Railroad Company] asserts that the State has no power to thus segregate a certain class of traffic and require the railroad company to carry that traffic at unremunerative rates."

The cases that were adduced to sustain the respective contentions the court enumerated, but considered that there was "little or no conflict" in them and that any confusion in them "almost altogether disappears" when they "are read in view of the fundamental principles involved." The court's conclusion from the

cases was, that "a carrier is entitled to fair remuneration on all its investments and property. It is entitled to no more. For this it undertakes to reasonably serve in the capacity chosen by it. It undertakes to serve for no less. If the carrier receives, in the aggregate, such fair remuneration, notwithstanding the rates on a part of its business are not remunerative, the carrier has no basis for complaint." And further, "When a rate on a part of the business is too low, some other part of the carrier's business may be paying too much, thus preventing a deficiency of income which would otherwise result from the non-remunerative rates. In such cases the shippers affected by the higher rates may have a basis for complaint. *Smyth* v. *Ames*, 169 U. S. 466, op. 540, *et seq.*" The court considered that the principle of the proposition announced was in its opinion "strongly up-held" in *Wood* v. *Vandalia Railroad Company* which the court regarded "to say the least" as holding that the hearing upon the character of rates "is not properly confined to the particular rates and the 'actual cost and outlay' in carrying the classes specified on a division in asserting whether a fair return is provided."

The court, therefore, makes clear the Federal question, and its decision makes the question precise by a contrast of the contentions of the parties. Let us repeat them: that of the Railroad Company is that the revenue from traffic to which the rates apply is the test of their legality and any deficiency in them cannot be made up by rates on some other traffic; that of the defendants in error is that the revenue from all of the intrastate business of the Railroad Company is to be taken into account, and if it be sufficient to remunerate the Railroad Company, the particular rates though unremunerative, are nevertheless legal.

The question presented by the contentions is not easy of off-hand solution, though its elements are easy of declaration. A railroad is private property, and as such, a rate may be fixed for its use; but it is private property devoted to the public service, and as such it is subject to the power of the State to see and require that the rate fixed be just and reasonable, one that while it will yield a revenue to the railroad, will be proportioned to that which should be charged to the public. And this relation of right and power is illustrated in many cases. It is declared in *Northern Pacific Railway* v. *North Dakota*, 236 U. S. 585, and a test of it

given, that is, when the right must yield to the power and when the power is limited by the right. And there was a consideration and review of all of the elements involved. It was declared that the legislature "has a wide range of power to prescribe reasonable charges and is not bound to fix uniform rates for all commodities, or to secure the same percentage of profit on every sort of business . . . It is not bound to prescribe separate rates for every individual service performed, but it may group services by fixing rates for classes of traffic." And this court will not sit in judgment upon such action and substitute its judgment for that of the legislature when "reviewing a particular tariff or schedule which yields substantial compensation for the service it embraces when the profitableness of the intrastate business as a whole is not involved." "But" the court said, "a different question arises when a State has segregated a commodity or a class of traffic, and has attempted to compel a carrier to transport it at a loss or without substantial compensation even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted." And further, "it has repeatedly been assumed in the decisions of this Court that the State has no arbitrary power over the carrier's rates and may not select a particular commodity or class of traffic for carriage without reasonable reward." It was, hence, concluded that where there is such segregation and a rate imposed which would compel the carrier to transport a commodity "for less than the proper cost of transportation, or virtually at cost" the carrier would be "denied a reasonable reward for its service," and "the State has exceeded its authority."

The case and its principle were followed and illustrated in *Norfolk & Western R. Co.* v. *Conley, Attorney General of the State of West Virginia*, 236 U. S. 605, and the principle applied to a passenger rate. It was there said, explaining the "range of permissible action" by a State that it, the State, "has no arbitrary power over rates; . . . and that the State may not select a commodity, or class of traffic, and insist on fixing what may be deemed to be a reasonable compensation for its carriage, compelling the carrier to transport it either at less than cost or for a compensation that is merely nominal." See also *Brooks-Scanlon Co.* v. *R. R. Comm.*, 251 U. S. 396.

These cases leave nothing to be said, nor need we review the prior cases from which they are deductions. The concession of counsel is "that it may be admitted that the *North Dakota* and *West Virginia* cases have greately discredited the previous theory and practice under which a rate which returned any revenue over and above 'out of pocket' costs was considered to be constitutionally remunerative . . ." Counsel are mistaken in their judgment of those cases. They did not discredit what had been announced of either theory or practice, they only removed them from misunderstanding and controversy and declared a principle that assigned to the State a useful power of regulation while it accorded to railroads a reasonable return upon the capital invested and a reward for its enterprise; a principle, therefore, which keeps power and right, in proper relation, if we may repeat ourselves, power not exercised in excess, right not used in abuse.

It is, however, contended by the defendants in error that the averments of the answer (second paragraph) are not sufficient to present the issue of law based upon it because it does not allege that the rates are not compensatory of the cost of the service "between the stations to which the rates apply" and that, therefore, it may well be that they are remunerative of that service, and "only be non-remunerative when applied to some other carriage." And it is further urged that the answer fails to specify upon what part of the carrier's property the rates will not yield a fair return, and, it is consistent with the answer, that there may be a fair return on the value of the property "used in carriage between the stations named in the order, although not sufficient to 'provide a fair return in handling and carrying the classes of property in said order specified' over some other part of its line."

The distinctions are artificial and strained. They are an attempt to make the necessary implications of the answer no part of it. The averment of a pleading need not be so certain that an affirmative allegation of the existence of a fact or condition must be accompanied by the negation of that which is contradictory to it or inconsistent with it. The answer besides is addressed to the complaint and to the rates and order of the Commission that constitute the bases of the complaint and puts them and the effect of them in issue. In other words, the complaint deals with the rates and service between designated stations, and the answer deals with

those rates and that service. And the Supreme Court so regarded it and explicitly said that the evidence made the issue. Counsel attack the conclusion as unsupported but we must accept it as it is the judgment of the court we are reviewing and it is to be estimated by the reasons given for it.

We, therefore, repeat, we regard the answer as a reply to the complaint and as alleging the invalidity of the order of the Commission because it required a service that the rates did not compensate, and necessarily this involves a consideration of all of the elements which are involved in that service, and determine its effect. It is to be remembered that we are dealing with a pleading. What the evidence may show we can neither know nor anticipate.

Another contention of defendants in error is that the law of the State prescribes the remedy to be pursued against an order of the Commission to be to procure from the Secretary of the Commission a transcript of the proceedings before the Commission and file such transcript with a statement of the causes of complaint against the action of the Commission in the office of the clerk of the Appellate Court of the State within a designated time, and give notice to the Commission. And it is said, the Appellate Court is given power to affirm the action of the Commission or to change, modify, or set it aside as justice may require, and that its judgment is made final. This procedure was not followed, it is said, and that hence the answer (paragraph 2) of the Railroad Company "was not a compliance with this requirement of the substantive law of Indiana, and for that reason failed to state a defense."

The contention is made for the first time in this court. Its lateness may not militate against it, but that it did not occur sooner to counsel and not at all to the Supreme Court, demonstrates its unsoundness. It is to be remembered that this is a suit, not by the Railroad Company but against the Company, and its purpose is to enforce rates established by the Railroad Commission, which the Railroad Company is resisting. The decision of the Supreme Court upon the grounds of suit and resistance is here for review, and, we must assume, that all that was pertinent to either the court considered, and regarded all else untenable including the contention now urged by counsel. It must, therefore, be rejected.

The final contention of defendants in error is that *Wood* v. *Vandalia Railroad Co.*, 231 U. S. 1, is *res adjudicata* of the issues in this case. The suit was by the Railroad Company to restrain the order of the Commission involved in the present litigation, and the ground of attack was, as it is here, that the rates ordered were not compensatory of the service to which they applied. The averments of the bill we held unsustained by the proofs and nothing more was decided. The judgment was not that the order of the Commission was valid but that it was not shown by the bill to be invalid, and the bill was dismissed without prejudice. That is, without preclusion of the right to show it invalid when attempted to be enforced at a subsequent period. *Missouri* v. *Chi. Burl. & Quincy R. R.*, 241 U. S. 533, 539, 540. We cannot therefore yield to the contention.

It follows that the decree must be reversed and it is

So ordered and the case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice DAY, Mr. Justice PITNEY, Mr. Justice BRANDEIS and Mr. Justice CLARKE, dissent.

A true copy.

Test:

Clerk Supreme Court, U. S.